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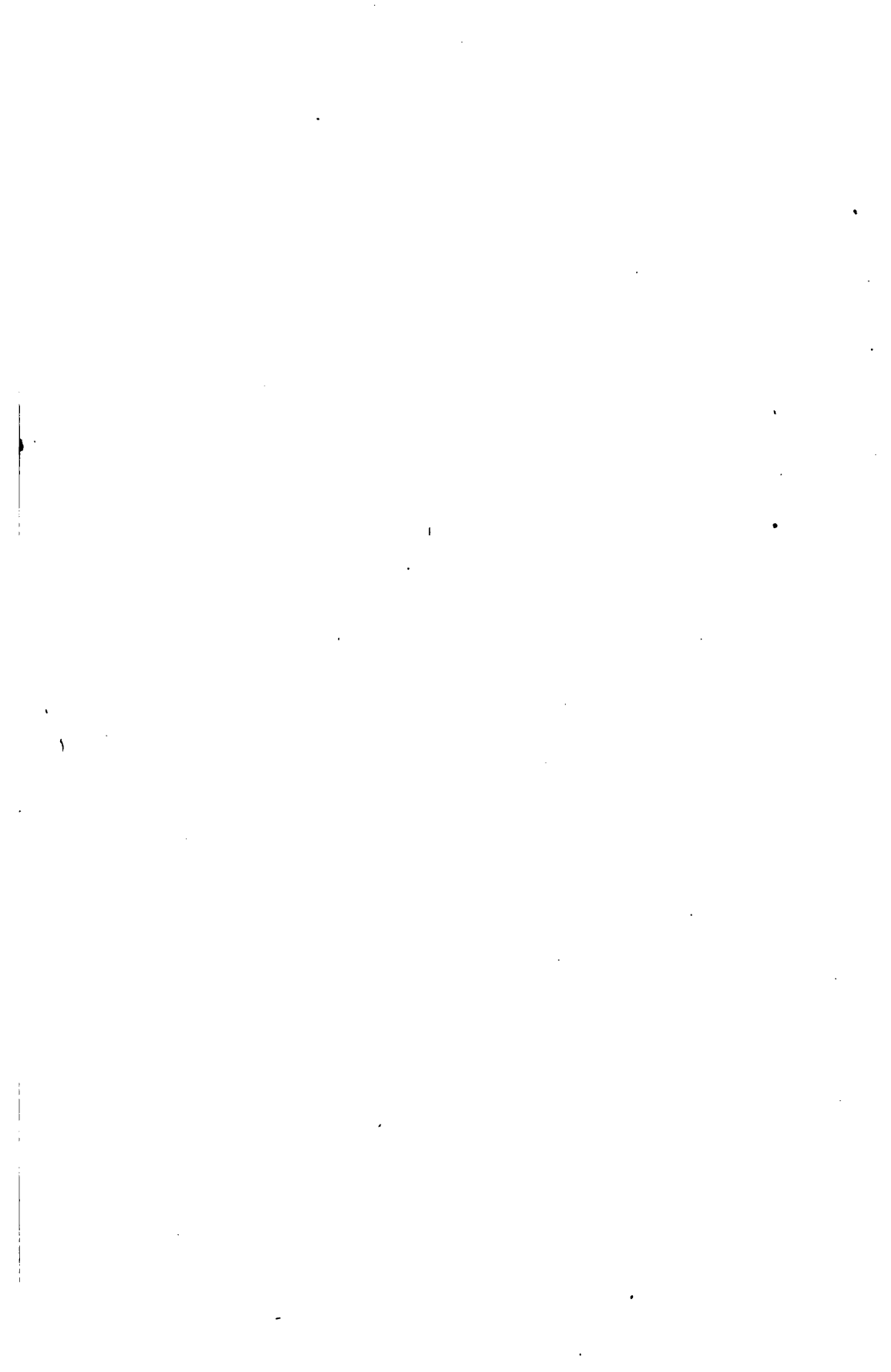


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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATE'S COURTS

OF THE

STATE OF NEW YORK

WITH ANNOTATIONS.

EDITED BY

CHAS. H. MILLS

OF THE ALBANY BAR

VOL. X.

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W. C. LITTLE & CO.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SURROGATES COURTS

OF THE

STATE OF NEW YORK.

Matter of the Application for the Revocation of Letters of Administration Issued to GIOVANNI LOMBARDI on the Estate of CARMINE COSTELLO, Deceased, and for the Issuance of Letters of Administration to the Italian Consul, GERMANO P. BACCELLI.

(Surrogate's Court, Schenectady County, December, 1912.)

**EXECUTORS AND ADMINISTRATORS—DEATH OF ITALIAN SUBJECT INTESTATE
—RIGHT OF ITALIAN CONSUL TO LETTERS OF ADMINISTRATION.**

Where a subject of the kingdom of Italy dies intestate in this state leaving him surviving no relative in this country entitled to succeed to his personal property, the Italian consul under treaty provisions has the prior right of administration upon the estate.

APPLICATION for the revocation of letters of administration.

Leary and Fullerton, for administrator.

Countryman, Nellis, DuBois & McDermott, for petitioner.

VEDDER, S.—Carmine Costello was a subject of the king-

dom of Italy and died intestate in Schenectady county, May 26, 1912, leaving him surviving a widow and two minor children, his sole next of kin, aliens residing in Italy.

Giovanni Lombardi, the person who was appointed administrator of his estate, was a cousin of decedent, residing in the city of Schenectady, and was appointed without issuance or service of citation upon the Italian consul who makes the application for the revocation of the letters of administration in this proceeding.

The petition for letters of administration was made on the 20th day of August, 1912, and letters issued to the said Giovanni Lombardi on the 20th day of August, 1912.

The petition of Giovanni Lombardi did not allege that the said deceased was at the time of his death an alien and a citizen of the kingdom of Italy.

The convention between the United States and Sweden, proclaimed March 20, 1911, provided "In the event of any citizen of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the Consul General, Consul or Vice Consul of the nation to which the deceased may belong, or, in his absence, the representative of such Consul General, Consul or Vice Consul, shall, so far as the laws of each country will permit, and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased, for the benefit of his lawful heirs, and creditors, and, moreover, have the right to be appointed as administrator of such estate."

The treaty of May 8, 1878, between Italy and the United States, article 17, provides: "The respective Consuls, Vice Consuls and Consular Agents as likewise the Consular Chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges

which are or may hereafter be granted to the officers of the same grade of the most favored nation."

There being no relative in this country who would be entitled to succeed to the personal property of the deceased, I am of the opinion that under that portion of the treaty with Sweden which provides, "and, moreover, have the right to be appointed as administrator of such estate," the Italian Consul has the prior right of administration of this estate.

Matter of *Rocca v. Thompson*, 223 U. S. 317, is not in conflict with but is in accordance with this conclusion. In that case the United States Supreme Court construed the provisions of the Argentine treaty and the rights of their respective consular officers, and in construing the provisions of that treaty used this significant language, "that treaties are a subject of careful consideration before they are entered into and are drawn by persons competent to express their meanings and to choose apt words in which to embody the purpose of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country dying in another exclusively to the consul of the foreign nations, it would have been very easy to have declared that purpose in unmistakeable terms. For instance, where that was the purpose, as in the convention between the United States and Sweden proclaimed March 20, 1911, it provided as hereinabove stated."

This language clearly indicates that had the court been construing the treaty with Sweden it would have considered its language sufficiently clear and explicit to have entitled the Italian consul to letters in that case.

From the foregoing, it is obvious that letters of administration on the estate of Carmine Costello issued to Giovanni Lombardi, August 20, 1912, should be revoked and issued to the Italian consul, Germano P. Baccelli.

SURROGATE'S COURT REPORTS.

Submit decree directing revocation and issuance of letters to the Italian consul.

Decreed accordingly.

Matter of the Appraisal of the estate of **PETER J. ELTING**,
Deceased, Under the Acts in relation to the Taxable Trans-
fers of Property.

(Surrogate's Court, Westchester County, December, 1912.)

**TAXES—TRANSFER TAX—ON INSURANCE POLICY—DISCRETIONARY POWER
TO SELL REAL ESTATE—NO DEDUCTION FOR EXPENSES.**

A policy of insurance on the life of a testator, in terms payable to his executors, administrators or assigns, for the express benefit of testator's wife and surviving children, is not subject to a transfer tax.

On an appraisal for the purpose of fixing a transfer tax no deduction can be allowed for the necessary expenses of converting into cash testator's real estate, as to which the executors had merely a discretionary power of sale.

APPEAL by executors from an order confirming the report of an appraiser, fixing and assessing the transfer tax.

R. E. & A. J. Prime, for executors and appellants.

John J. Sinnott, for State Comptroller and respondent.

MILLARD, S.—The report of the appraiser was filed in the office of the surrogate on the 1st of June, 1912, and *pro forma* order confirming the same and fixing the transfer tax therein was entered June 4, 1912. From that order an appeal has been

taken and two questions are involved. (1) As to whether or not the proceeds of a life insurance policy issued by the Massachusetts Mutual Life Insurance Company, upon the life of the testator, aggregating \$3,899.81 are to be included as a part of the assets of the estate of the testator, passing under the will, and, therefore, taxable. It is claimed by the appellants that the proceeds of this policy form no part of the assets of the estate and are the absolute property of the surviving wife and children of the assured, for whose express benefit the policy was made payable to his executors, administrators or assigns and the opposite of this is claimed by the respondent. (2) As to the refusal of the appraiser to deduct from the testator's estate \$500 claimed as the necessary expenses of converting into cash the real estate of the testator which it is contended was equitably converted by the will, and again the opposite of this is claimed by the attorney for the comptroller.

The deceased died on the 10th of August, 1911, a resident of the county of Westchester and state of New York, leaving a last will and testament which was duly proven and under which letters testamentary have been issued to the appellants, the executrices named therein and leaving him surviving his widow, Carrie D. Elting, and two daughters, Elizabeth F. L. Elting and Helen Stickney Elting.

By the briefs it appears that a policy for \$3,000 issued by the Massachusetts Mutual Life Insurance Company upon the life of the deceased and payable to the executors, administrators or assigns, for the express benefit of his wife, Carrie D. Elting, and surviving children, the amount of which policy, together with certain dividends and accruments thereon at the time of the decedent's death amounted to the sum of \$3,899.81, has been collected by and paid to the executrices.

The law at the time of decedent's death was to the effect that the proceeds of insurance policies upon a decedent's life pay-

able to his legal representatives or estate were taxable. In the case at bar we have a policy by its terms payable to the executors, administrators or assigns, but with a provision further that it is "for the express benefit of his wife, Carrie D. Elting, and surviving children." It seems to me that the language of the policy simply designates the executors, administrators or assigns as some one to whom the payment can be made but it is clearly not for them to say what shall be done with it but they are the medium only to pass the money to the widow and children, who are alone entitled to its proceeds. Suppose we look for what to me would be a fair test and must be decisive of the question involved, and ask, "Suppose this estate was insolvent, could the proceeds of this policy be taken and used for the payment of debts of the estate?" If it could, then I have no doubt that it is taxable, but to my mind the opposite is perfectly clear and, even if creditors were clamoring for their just due from the executrices in this case, it would be impossible for them to obtain one dollar from this policy, payable as it is, "for the sole benefit of the widow and children" and to my mind for all practical purposes, the same as if no other designation was made in it than that portion of the clause in the policy, "his wife, Carrie D. Elting, and surviving children." This policy, to my mind, is merely a contract between the decedent and the company for the benefit of his wife and children and no one else is or can be interested therein and the same does not pass by reason of the provisions of this will but by reason of the clause in the policy itself, and I, therefore, reverse the ruling of the appraiser holding that the proceeds of this policy are taxable, and an order should be made exempting the same from taxation for collateral inheritance and transfer tax purposes.

As to the other question, I cannot agree with the appellants, because a careful reading of the will fails to convince me

that there is such an equitable conversion as would justify the allowance of \$500 asked for.

"To establish an equitable conversion of real estate into personalty by will, the will must direct the sale and the distribution of the proceeds as personal property absolutely for all purposes, irrespective of contingencies, and independently of any discretion as to whether there shall be a sale or not." *Trowbridge v. Metcalf*, 5 App. Div. 318.

At the most, the power of the executrices in this case is discretionary and I do not think an equitable conversion has been made out. I, therefore, as to the second ground of appeal, affirm the decision of the appraiser in holding that \$500 should not be deducted from the amount of the estate because of expenses which will be incurred in selling the same.

Order in accordance with the above memorandum will be signed.

Decreed accordingly.

**Matter of the Probate of a Paper Writing Purporting to be the
Last Will and Testament of ALBERT C. BOSTWICK, Deceased.**

(Surrogate's Court, Westchester County, December, 1912.)

**DECEDENT ESTATE LAW, § 26—RIGHTS OF AFTER-BORN CHILDREN NOT
MENTIONED IN WILL OF TESTATOR.**

The phrase "unprovided for by any settlement" in section 26 of the Decedent Estate Law, relating to the rights of a child born to a testator after he had made his will, means a settlement made by the testator.

Where after-born children of a testator were neither mentioned in his will nor provided for by any settlement made by the tes-

tator, the decree admitting the will to probate should make the same provision for the said children as they would have been entitled to had their father died intestate.

PROCEEDINGS upon probate of a will.

Holmes, Rapallo & Kennedy, for petitioner.

Jacob Halstead, for Marie S. Bostwick.

Burton C. Meighan, special guardian of the infants Dorothy S. Bostwick, Albert C. Bostwick, Jr., Lillian S. Bostwick, Dunbar W. Bostwick and George H. Bostwick.

MILLARD, S.—This is a proceeding for the probate of the last will and testament of Albert C. Bostwick, deceased, who died on the 10th of November, 1911, seized and possessed of real and personal property.

By the terms of said will, which was duly made and executed on the 8th of June, 1899, after the payment of debts, he gave, devised and bequeathed all the rest, residue and remainder of his property, of every kind and description, to his wife, Marie S. Bostwick, absolutely.

At the time of his death he left him surviving his widow and his children Dorothy S. Bostwick, born on the 26th of March, 1899, Albert C. Bostwick, Jr., born April 1, 1901, Lillian S. Bostwick, born July 9, 1906, Dunbar W. Bostwick, born January 10, 1908, and George H. Bostwick, born August 14, 1909. From this statement it appears that four of the children above referred to were born after the making and execution of the will sought to be probated.

The special guardian, while not objecting to the probate of the will, claims that it should be provided in the decree that the four after-born children are entitled to the same rights in the

estate of the said Albert C. Bostwick, deceased, that they would have had if no will had been made. He makes this claim because of section 26 of the Decedent Estate Law, which reads as follows:

“Sec. 26. Child born after making will.—Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent’s real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.”

It is conceded by all parties that no mention is made of these children in the will and the only question raised is whether or not there was a settlement otherwise made, which would satisfy the provisions of the statute.

Albert C. Bostwick was the son of Jabez A. Bostwick and Helen C. Bostwick. In the months of August and September, 1890, Jabez A. Bostwick made, executed and delivered certain trust deeds to the Farmers’ Loan and Trust Company and the United States Trust Company, by the terms of which the said Albert C. Bostwick, (the testator herein) was to receive the income arising therefrom during the term of his life, and upon his death the principal fund so held was to be paid over to his issue, share and share alike, absolutely.

Jabez A. Bostwick died August 16, 1892, and these trust deeds were in full force and effect as no one other than he had any power to change them at the time of the making of the will of Albert C. Bostwick. Said Jabez A. Bostwick left a last will and testament which was duly admitted to probate by the sur-

rogate of the county of New York, wherein it was provided among other things that one-third of his residuary estate was directed to be paid over to the Farmers' Loan and Trust Company to be held by it in trust for the life of Helen C. Bostwick, the mother of Albert C. Bostwick, and during her lifetime the income arising therefrom was to be paid to her, and upon the further trust for the life of Albert C. Bostwick, and, upon the death of both Helen C. Bostwick and Albert C. Bostwick, the principal fund so held to be paid over to the issue of Albert C. Bostwick. The provisions of said trust deeds and said last will and testament were in existence and full force and effect irrevocable and known to the testator on the 8th of June, 1899, the time of making his last will and testament.

The provisions of these deeds and last will and testament of Jabez A. Bostwick for the children of Albert C. Bostwick provided for them a large sum of money, which it is urged by the proponent's attorneys and counsel amply provide for them and which they think I should take into consideration in deciding this case. I cannot feel, however, that that has anything to do with the question but believe it must be approached and considered from the standpoint of a very much smaller estate and that this large sum should not in any way affect the mind of the person who is to decide it.

If the question of whether or not an infant has sufficient provision made for it in any way is to be considered, then in each case we must take up the question of how much it should be and what is reasonable according to the circumstances of each case, and however sympathetic one might feel, and however he might be inclined to say that all would be amply provided for if the will was allowed to stand, I do not feel that any consideration should be given to this branch of the case but the statute must be construed as it is without any reference to the amount of money involved in the transaction.

Upon the hearing testimony was offered as to the making of all of these instruments and the due probate of the will, the present condition of the accounts and showing a history of all of these transactions on the part of Jabez A. Bostwick and the acts of the trustees and the condition of the accounts down to date. This testimony was taken over objection because it would be practically deciding the case at once if it was excluded and so the ruling upon the objection was reserved until the final decision in the matter. Having now arrived at a conclusion as to what this statute means I am convinced that all of this testimony should be excluded and I therefore sustain the objection and grant the motion to strike out the same.

There have been several decisions in this state bearing upon this subject but I consider the case of *Udell v. Stearns*, 125 App. Div. 196, and *McCrum v. McCrum*, 141 id. 83 (where even the similar condition of one child born before the making of the will, and the others afterward, existed as in this case) lead me to but the one conclusion, namely, that that portion of the statute "unprovided for by any settlement," means a settlement made by the testator.

It would be possible for me at this time to discuss at length the many arguments raised in the voluminous briefs in this case but I have carefully read and weighed every one of them and it leads me to the same conclusion above expressed, so that I feel that no good purpose would be served by so doing.

I, therefore, direct that the will of Albert C. Bostwick be admitted to probate but that the decree to be entered thereon shall provide that Albert C. Bostwick, Jr., Lillian S. Bostwick, Dunbar W. Bostwick and George H. Bostwick, on the death of Albert C. Bostwick, became seized in fee, as his heirs at law, each of an undivided one-fifth of the real estate of which he died seized, subject to the dower of his widow, Marie S. Bostwick, and that they are each entitled to have distributed to

them, respectively, two-fifteenths of the personal estate of which said Albert C. Bostwick died possessed. This provision for them is the same as they would have been entitled to had said Albert C. Bostwick died intestate.

Findings and decree in accordance with this memorandum will be signed. Costs and allowances to be fixed at the time of making the decree.

Probate decreed.

Matter of the Probate of a Paper Writing Purporting to be the Last Will and Testament of SARAH H. PATTISON, Deceased.

(Surrogate's Court, Westchester County, December, 1912.)

WILLS—EXECUTION IN TRIPPLICATE—TWO LOST—DECLARATIONS OF TESTATRIX—PROBATE.

Where a will was executed in triplicate in 1883, the presumption, that the one traced to the possession of the testatrix but which could not be found after her death was destroyed with intention to revoke, is overcome by proof of her declaration, made a few days before her death on the opening of a safe in which were found a will made by her in 1874 and another made by a deceased sister, that the wills were at Williams College.

Where the testatrix had no immediate relatives or friends with whom intimacy of any kind existed, and the provisions of her will seem entirely natural, and it appears that one of the triplicate wills was left with testator's attorney who sent one to the then president of Williams College and the third one was taken away by testatrix at the time of the execution of her will, and its whereabouts not known, and the absence of the one left with her attorney is satisfactorily accounted for, the one produced by Williams College and shown to have been in the possession of its treasurer at the time of the death of testatrix will be admitted to probate.

PROCEEDING upon the probate of a will.

Frank L. Young, for proponent.

James L. Bishop (Charles H. Beckett, of counsel), for Gardiner Pattison and others.

Gescheidt & Toomey, for Francis Larkin, special guardian.

MILLARD, S.—Sarah H. Pattison died at Ossining, Westchester county, N. Y., on the 29th of November, 1911; that said Sarah H. Pattison left her surviving George S. Pattison, Edwin Pattison, Louise Pattison Chenoweth, Gardiner Pattison, William J. Pattison, Josephine Pattison, Samuel Pattison, Anna M. Tarbet, Elmer E. Gibson, Mary Hoffmeier, Cornelia I. Osborn, Leslie Boughton, Carrie Boughton and Newell Boughton, her heirs at law and next of kin; that a petition was duly filed in this court praying that a paper writing bearing date the 14th of March, 1888, subscribed at the end by said Sarah H. Pattison, in the presence of Charles F. Bauerdorf, John F. Quinn and William Malloy, purporting to be the last will and testament of said Sarah H. Pattison, be admitted to probate.

The evidence in this case discloses to my satisfaction that this paper writing, so produced, was executed in triplicate by the said Sarah H. Pattison at the time it bears date; that one of said counterparts or examples was left with David Dudley Field; that another of said examples or counterparts was sent by said David Dudley Field to Franklin Carter, former president of Williams College and the third of said counterparts or examples was delivered to the said Sarah H. Pattison and taken away by her at the time of execution; that the paper writing produced in this proceeding was at the time of the

death of said Sarah H. Pattison in the possession of the treasurer of Williams College, at Williamstown, Mass., to whom it had been delivered by Franklin Carter, the former president, sometime after he had received it from David Dudley Field, attorney for said Sarah H. Pattison, by mail, as above mentioned.

The testimony further discloses that an examination through the papers of the old firm of which Mr. Field was a member, made by Mr. Bauerdorf, failed to disclose the copy which had been left with them but it was entirely possible that Mr. Field, when he removed his papers, had taken it with him, and I consider that that is a very plausible and most probable solution of the question as to what became of that counterpart and by reason of the fact that Mr. Field's papers have been scattered and that every opportunity for their being mislaid or lost has been offered, I consider that that counterpart or example has been satisfactorily accounted for.

A few days after the death of Elizabeth A. Pattison who died ten days before her sister, Sarah H. Pattison, said Sarah H. Pattison sent for Mr. Frank L. Young, the attorney for the proponents in this matter, undoubtedly to take up the matter of the probate of her sister's will, and a few days later, and less than two days before her death, an attempt was made to open the safe in which their papers were supposed to be kept, but as they were unable to do so, she having apparently lost the combination, if she ever had it (her sister being the one who was accustomed to take care of such matters), it was necessary to send for an expert and a few days later the safe was opened in the presence of Mr. Reilly, his daughter, Mr. Young, Mr. Farren and the said Sarah H. Pattison. No wills were found except two, one executed by Elizabeth and the other by Sarah H. in 1874, which wills have been offered in evidence in this case. The result of the examination was that no other

wills were found in the house and that Mr. Young spoke to Miss Pattison about the matter and she said the wills were at Williams College.

There can be no doubt that it is the law of this state that, when a will traced to the testator's possession is not forthcoming on his death, the presumption is that it was destroyed by him with the intention of revoking it and that presumption arises in this case where what purports to be a will was executed in triplicate and the one which was in the possession of the testatrix is not produced or accounted for.

On the part of the proponents it is admitted that this presumption exists, but they claim to have overcome it by the declaration of Sarah H. Pattison, at the time when the safe was opened.

This declaration was testified to by Miss Reilly, Mr. Young and Mr. Farren and I am satisfied, convinced as I am that it was the intention of this woman that this will should be probated and that her property should go as provided in said paper writing, that this evidence overcomes the presumption in this case. These statements made less than two days before her death, and at a time when neither the counterpart delivered to her nor the counterpart of the sister's will could be found in the house, must be considered competent to show that the will at Williams College was still the one which she recognized as hers.

The counsel for the contestants moved to strike out all the testimony given by the witnesses Farren, Reilly and Young, on pages 29, 33 and 49 of the minutes, and I reserved decision thereon until the case should be decided (because it was practically deciding the case itself to rule upon the admission or rejection of this testimony) and I now deny the said motion and grant an exception to the contestants' attorneys.

We have in this case a will as carefully and as properly drawn

as any that has ever been offered for probate. It shows upon its face, however, that it was executed in triplicate. The testimony offered, as I stated before, I believe to be competent to overcome the presumption of the law that the paper writing was revoked by the testatrix. In view of the fact that she had no immediate relatives or friends with whom intimacy of any kind existed, the provisions of the will seem entirely natural, and, while the whereabouts of the particular counterpart delivered to the said Sarah H. Pattison is not known or shown in this proceeding, I consider that in view of all the circumstances of the case her declaration shows sufficiently that the will was not revoked by her.

For this reason I have decided that the will of Sarah H. Pattison is entitled to and should be admitted to probate.

Findings and decree in accordance with this memorandum will be signed.

Probate decreed.

In the Matter of the Appraisal of the Estate of CHARLES B. HOGG, Deceased, Under the Acts in Relation to the Taxable Transfers of Property.

(Surrogate's Court, Westchester County, December, 1912.)

TAXES—TRANSFER TAX—GIFT TO UNCERTAIN NUMBER ASCERTAINABLE IN FUTURE ONLY TAXABLE AS SINGLE LEGACY.

Where a testator's residuary estate was devised and bequeathed in trust for a body of persons uncertain as to number and ascertainable only at a future time upon the death or remarriage of testator's widow, and the value of the definite portion each of said persons is to take is determinable only upon the number of

the survivors at the time of the division of the trust fund, it is subject to a transfer tax as one legacy.

Matter of Jourdan (70 Misc. Rep. 159) followed as to rate of taxation, and report of appraiser reversed.

APPEAL from an order confirming the report of an appraiser fixing and assessing the transfer tax.

Stewart & Shearer, for United States Trust Company, appellant.

Henry W. Simpson, for Permelia T. Lindridge, and others, appellants.

John J. Sinnott, for State Comptroller, respondent.

MILLARD, S.—Charles B. Hogg died a resident of the county of Westchester, state of New York, on the 5th day of January, 1911, leaving a will which was thereafter admitted to probate by the Surrogate's Court of the county of Westchester. A proceeding was thereafter commenced by the executors of his will for the assessment of the transfer tax upon his estate and upon the report of the appraiser, duly appointed, an order was made and entered on the 7th of July, 1911, fixing the transfer tax upon the property of the decedent.

This appeal is taken from two provisions of the order. (1) The appellants claim that the tax assessed against the property passing under the fifth paragraph of the will should have been assessed separately against the various life and remainder interests in the testator's residuary estate in place of being assessed as one legacy after the deduction of the widow's life estate, and (2) that the said tax should have been assessed so that the first \$100,000 in excess of \$25,000 should be at one per cent in place of \$100,000 including the first \$25,000.

The fifth paragraph of the said will, is as follows:

"Fifth. All the rest, residue and remainder of my property, both real and personal, of whatever kind or nature, and wherever situate, I give, devise and bequeath to the United States Trust Company of New York, in trust, however, to invest and keep the same invested, and out of the income therefrom, to pay over to my wife, Caroline F. Hogg, during her life, or until her remarriage, the sum of five thousand two hundred dollars annually in equal quarterly payments, on the first days of February, May, August and November, beginning as of the first of such quarterly dates after my decease; and until my executors hereinafter named turn over the property of my estate to my said trustee, I direct my said executors to make such payments out of the moneys then in their hands; the balance of the income of my estate, after the payment of the annuity above provided for, I direct my said trustee to pay over quarterly in equal shares to my three daughters, Amelia T. Lindridge, Annie F. Crafts and Mary E. Maxwell, or in the event of the death of either of them, to the survivors of them and the surviving children of any such deceased child, per stirpes; upon the death or remarriage of my said wife, I direct my said trustee to divide my property then in its hands into as many equal shares or portions as there may be daughters me surviving or represented by issue then surviving, and to continue to invest and hold one of said shares or portions in trust for the benefit of each of my said surviving daughters and to pay over the income therefrom to such daughter quarterly during her natural life and upon her death to pay over and deliver the principal of such trust fund together with all accumulated income to her lawful issue, her surviving, or in default of such issue to my surviving children and the issue, then surviving of any such child who may have died, per stirpes; and in the event of the death of any of my said daughters be-

fore the division of my property as hereinabove provided, leaving lawful issue her surviving, I direct my said trustee upon such division of my property, to pay over and deliver the share or portion thereof which otherwise would have been retained in trust for such deceased daughter to her issue her surviving, per stirpes."

The appraiser, after having the value of the annuity of the widow appraised by the insurance department, taxed all the residue of the estate to the United States Trust Company of New York, which was entitled to the same according to the fifth paragraph. In other words, as in said fifth paragraph provided, the trustee is to pay to the widow an annuity of \$5,200 per year during her life or until her remarriage and the balance of the income is to be paid to the daughters of the decedent surviving him or to the issue of any deceased daughter *per stirpes*. If this were all of the paragraph there could be very little doubt as to the manner of arriving at the tax or the rate thereof but the clause further provides that *after the death or remarriage of the widow* the entire trust estate is to be divided into as many equal parts as there are then daughters surviving or issue representing deceased daughters and each share is to be invested and the income paid over for life to the daughter and remainder over to her issue, and in case a daughter has died at the time of the division that share is to be paid to her issue, and in the case of a daughter dying without issue her share is to go to the survivors.

It seems, therefore, plain to me that the final disposition of the trust estate is postponed until the death or remarriage of the widow and it cannot be definitely determined who is to share in this fund until the happening of such event. There is no possible manner at this time of determining to whom or in what proportion the residuary estate is finally to go. The persons to share in the residuary estate are to be determined at

the time of the division, which is to be made at a future time, namely, at the death or remarriage of the widow. It seems to me that this condition fully complies with the rule of a gift to a class as laid down in *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, which is as follows: "A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number, at the time of the gift, *to be ascertained at a future time*, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number."

In this case we have a gift to a body of persons uncertain as to number and only to be ascertained at a future time (the death or remarriage of the widow) and the value each is to take is a definite portion but only determined upon the number of the survivors at the time of the division.

I, therefore, hold that the bequest to the United States Trust Company of New York is a bequest to a class and as such is taxable as one legacy and I, therefore, confirm the report of the appraiser in so taxing it.

As to the other point in the case there is no longer any doubt but that the appraiser's report must be reversed upon the authority of *Matter of Jourdan*, 70 Misc. Rep. 159, and the first \$25,000 should first be taxed and then \$100,000 instead of \$75,000 additional and the first \$25,000 as in said report set forth. As to this the appraiser's report should be reversed.

Order in accordance with above memorandum will be signed.

Decreed accordingly.

**Matter of the Judicial Settlement of the Account of EVA
MAUD MARINE, as Executrix of the Estate of MARY CRUIK-
SHANK, Deceased.**

(Surrogate's Court, Kings County, December, 1912.)

**LEGACY—SPECIFIC OR DEMONSTRATIVE—DELIVERY TO SAVINGS BANK OF
CERTIFICATE OF DEPOSIT—EXECUTORS AND ADMINISTRATORS.**

Where an executrix the day before the death of her testatrix delivered to a savings bank a certificate of deposit for \$1,000, indorsed by decedent and payable to her order on its return properly indorsed to a national bank from which she received it, and the savings bank, within a week after her death, upon being informed by the indorsee that the certificate had been paid, opened an account in the name of the decedent, in trust, for her executrix, naming her a legacy of \$500 payable exclusively out of any funds testator might have on deposit is payable by the executrix whether said legacy be called specific or demonstrative.

PROCEEDINGS upon the judicial settlement of the accounts of an executrix.

William Drennan, for executrix.

Hastings & Larkin (Neal D. Becker, of counsel), for Charles H. Schambacher, legatee.

KETCHAM, S.—The will under which accounting is made contains this paragraph.

“*Second.* I give and bequeath to Charles H. Schambacher, the sum of Five hundred dollars, payable exclusively out of any funds I may have on deposit in any Bank in Friendship, New York.”

The stipulation upon which the matter is submitted contains

the following facts: May 16, 1910, the decedent deposited in the First National Bank of Friendship, in the village of Friendship, N. Y., \$1,000, for which she then received from the bank a certificate of deposit for \$1,000, "payable * * * to the order of herself on return of this certificate properly endorsed." Thereafter, during the lifetime of the decedent, the deposit and the certificate remained without change unless the change were effected by the following transaction:

October 7, 1910, said certificate of deposit was delivered by the present accountant to the Williamsburgh Savings Bank of Brooklyn, indorsed by the decedent. On the same day the bank last named indorsed the certificate and delivered it to another bank.

On October 8, 1910, the decedent died.

On October 13, 1910, the savings bank was informed by its indorsee that the certificate had been paid, and on the same day the savings bank opened an account in the name of "Mary Cruikshank in trust for Eva Maud Marine."

The \$1,000 was credited on the records of the Friendship bank to the account of Mary Cruikshank, and so remained until October 10, 1910, when the certificate of deposit was paid.

The question is presented whether or not the legacy of \$500 to Charles H. Schambacher is now payable by the accountant.

The certificate of deposit was a promissory note, with all its attributes (*Baker v. Leland*, 9 App. Div. 365, and cases cited; *Hanna v. Manufacturers Trust Company*, 104 id. 90). It was of the class of instruments of which the statute declares that the delivery, either by the party making or indorsing, "may be shown to have been conditional or for a special purpose and not for the purpose of transferring the property in the instrument." Neg. Inst. Law, § 35.

It is made certain by the stipulation that the certificate was indorsed by the decedent to the savings bank and was received

by the latter with the mutual understanding that the paper was put into the possession of the bank for the special purpose of collection and not for the purpose of transferring the property in the instrument. *Bank of America v. Waydell*, 187 N. Y. 115. The case cited is none the less parallel because the bank-indorsee which was there found to be merely the collecting agent was the direct indorsee of a prior collecting agent, while in the case at bar the savings bank took directly by the indorsement of the actual owner of the instrument.

The intervention of the person who delivered the certificate to the savings bank alters nothing. She had no property in the paper or the fund which it represented. Any consummated interest therein is forbidden her by the fact that the decedent, throughout the brief remainder of her life, intended no more for the benefit of the accountant than the creation of a trust to come into existence only when the fund covered by the certificate should reach the savings bank.

This question must not be confused by the citation of authorities in which it is said that for the purpose of a gift the mere delivery of any instrument for the payment of money is effectual, even though such instrument is by its nature transferrable by indorsement and is not indorsed. The rules, under which a symbolical delivery for the purpose of a gift may be recognized, have nothing to do with the question whether or not the deposit in the Friendship bank remained there when the decedent died. But in this case there was no gift by the decedent nor intention to give. The former is excluded by the absence of any delivery whatever to the accountant which could bear the similitude of an intention to invest the accountant with the present ownership of the fund.

That the instrument was "delivered" to her is admitted, but it is plain that such "delivery" was merely for the purpose of transportation to the savings bank. Intention to make a gift,

either present or future, is made impossible by the evidence that the decedent only contemplated a trust which would leave the legal ownership of the fund in herself and that even such trust was never created by her. She, while endeavoring to open an account in which she would remain primarily the owner of the fund however burdened by a trust, could not be engaged at the same time in making a gift of the same fund.

If, then, the decedent at her death remained the owner of the fund and the fund was unchanged, either in its location or its legal or equitable ownership, she had when she died funds on deposit in a bank in Friendship, N. Y., and the legacy contained in the second paragraph of her will is payable whether it be called specific or demonstrative.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of UNITED STATES TRUST COMPANY OF NEW YORK, substituted Trustee Under the Will of JOHN WILSON, Deceased.

(Surrogate's Court, Kings County, December, 1912.)

WILLS—CORPUS OF ESTATE AFTER DEATH OF LIFE TENANT GIVEN TO TESTATOR'S CHILDREN—GIFT TO ISSUE AFTER LIFE ESTATE.

Where the corpus of an estate after the death of a life tenant was given to testator's children in equal shares, the will stating the issue of any deceased child or children to represent the share which the parent would have been entitled to receive, a grandchild of testator, whose father died before the life tenant, is entitled to receive the entire share to which her father would have been entitled.

PROCEEDING upon the judicial settlement of the account of
a substituted trustee.

Stewart & Shearer, for petitioner.

George Ryall, for Mary E. Wilson.

Thompson, Warren & Pelgram, for Alice Wilson Allan.

Franklin Taylor, special guardian, for children of Alice
Wilson Allan.

KETCHAM, S.—In the will under which this account is made, the provision to take effect upon the death of the life tenant is as follows: "After her death I give, devise and bequeath the same to my eight children (naming them), in equal shares, the issue of any deceased child or children to represent the share which the parent would have been entitled to receive."

One of the eight, Charles L. Wilson, died before the death of the life tenant, leaving him surviving a daughter, Mrs. Allan, and her several children.

The question is presented whether Mrs. Allan is entitled to take the entire interest to which her father would have been entitled, if living, or shall participate therein with her children.

The phrase under consideration in the will at bar may possibly be construed without recourse to the baffling expositions of the word "issue" when found in relation to the word "parent."

There is an express gift to eight children of the testator, in equal shares, but there is no express gift over in case of the death of any of the eight. The only intimation of such gift over is contained in the words "the issue of any deceased child

or children (of the testator) to represent the share which the parent would have been entitled to receive." While this language will be conceded to carry an estate to the issue with the same effect as if the testator had used the words "I give and devise to the issue" it still remains beyond doubt that such estate is derived only by implication and that the inference upon which such implication arises is to be taken solely from the phrase last quoted.

The gift to be implied is affected in its nature and every detail by the whole phrase from which the gift is derived. The only devise which the language by any suggestion yields is such as may be enjoyed in and by the act of representation. Unless the issue "represents" he takes nothing. It is as if the testator said, "I devise the remainder to the issue in such form of estate that he, she or they shall represent the share bestowed." Hence, whoever shall take under the provision quoted, none may take except by representation.

The fiction of the law defining the estate which one thus takes is that the taker is the representative of the person whose place he occupies and that he succeeds to nothing but the position and rights of the one whom he represents. In this case, as it must always be in the simple application of the doctrine, the representation which is intended to characterize the devise must be that by which a possible beneficiary takes the place of his own parent.

If, then, no one of the descendants of a deceased child of the testator may take except by the assumption of the place and interest which his immediate progenitor would have taken, the meaning of the words, "issue" and "parent" becomes unimportant. Whoever may be the "issue" contemplated by the testator, whether child or descendant of his deceased child, no such "issue" may take unless his own parent be dead, for without such death he has no one whom he can represent.

In this view, there is no room for speculation as to whether the testator measured his word "issue" by his own conception that his other word "parent" bore its narrow lexicographical meaning or included a grandparent. It cannot be said that the word "represent" was aimlessly introduced into this phrase. The presumption is to the contrary, and it is confirmed by the general rhetoric of the will and by contrast with, at least, one other phrase in which an estate is given without qualification.

The decree should provide for the payment to Mrs. Allan of the entire share to which her father would have been entitled.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of
ADELINE E. R. ANDERSON, Deceased.**

(Surrogate's Court, Kings County, December, 1912.)

**WILLS—PROBATE—WITNESSES—CODICIL EXECUTED IN SISTER STATE IN
ACCORDANCE WITH LAWS THEREOF.**

Where a resident of this state while in the state of Florida executes a paper purporting to be a codicil to her last will, and the law of that state provides that all wills of personal property shall be in writing and signed by the testatrix or some other person in her presence and by her express direction, said codicil, so far as it affects personal property, is entitled to probate in this state, though not attested by any subscribing witnesses.

PROCEEDING upon the probate of a will and codicil.

***Foley & Martin*, for proponent.**

Philip A. Brennan, for contestant Louise Schuyler Small.

Franklin Taylor, for contestants Grace M. Peterson and George M. Peterson.

Cardozo & Nathan, for contestant Robert Weir Hempstead.

Isaac W. Goodhue, for Maud E. Ihne and Virginia Johnson.

Edward J. Dowling, special guardian for Florence Almeda Christobelle Hempstead, Willie Mary Marguerite Hempstead and Maud E. Ihne, infants.

Morris Cohen, special guardian for Charles Littell, an incompetent.

KETCHAM, S.—The will of the decedent, upon due proofs, is about to be admitted to probate. A paper is also propounded as a codicil and the question arises, whether or not it can be admitted to probate only as an instrument affecting personal property. It has the form of a codicil. It is self-styled a codicil. It is subscribed by the decedent but it is not attested by any witnesses.

The fact will be found that the decedent was a resident of the state of New York when this instrument was made and that the same was made in the state of Florida. The New York statute provides that "A will of personal property executed without the state and within * * * the United States * * * as prescribed by the laws of the state * * * where it * * * was executed" may be admitted to probate in this state. Decedent Estate Law, § 23.

The Florida statute is "All wills of personal property shall

be in writing and signed by the testator or some other person in his presence and by his express direction." Gen. Stat. of Florida, § 2274.

In *Hays v. Ernest*, 32 Fla. 18, the court speaks as follows of the statute last quoted: "The statute did not undertake to prescribe the mode of executing wills in reference to the disposition of personal property, further than to regulate the revocation of such wills when written, and the establishment of nuncupative wills. In other respects the common law rule controlled the execution of wills concerning personal property, and according to this, such wills when written required no witness to their execution. (*Meyer v. Fogg*, 7 Fla. 292; *Schouler on Wills*, sec. 318)."

The statement of the parties as to the law of Florida is accepted as among the facts proved. The surrogate makes no personal inquiry upon the subject.

From that statement it appears that a will made under circumstances such as surrounded this codicil would be executed as prescribed by the law of Florida and should be admitted to probate in this state. *Matter of Gaines*, 84 Hun, 520; *affd.*, 154 N. Y. 747.

The case of *Moultrie v. Hunt*, 23 N. Y. 394, and the many cases in which it was followed were swept away by the amendment of 1893 which remains in the statute cited, *supra*. Decedent Estate Law, § 23.

An argument is made upon the theory that the questionable paper was "simply an instrument of revocation and not a testamentary disposition of the property." It was by its terms, its declared character and the method of its execution a testamentary instrument. By virtue of it, if valid, residuary legatees receive a portion which, without it, they would not have received, and whether it be called by its statutory name "an instrument of revocation or alteration" or, by its earlier

name, a "codicil," it is to be judged by the rules which surround a will.

The codicil is admitted to probate so far as the same affects personal property.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of ALLAN W. GODWIN, as Sole Surviving Trustee Under the Last Will and Testament of RICHARD J. GODWIN, Deceased.

(Surrogate's Court, Kings County, December, 1912.)

WILLS—DEVISE OF RESIDUARY ESTATE WITH REMAINDER OVER—VESTED REMAINDER—DEATH OF REMAINDERMEN BEFORE LIFE TENANT LEAVING ISSUE.

Where a will creates a trust to pay the net income of testator's residuary estate to his wife during life, and upon her death to pay over, divide and distribute said estate to and among four sons in equal shares, and provides that, should any one or more of them die without leaving lawful issue before such distribution, then the share or shares of him or them so dying should be equally divided among all testator's grandchildren then living share and share alike, and in case of the death of any one or more of said grandchildren dying leaving lawful issue such issue should receive the share his, her or their parent would have taken if living *per stirpes* and not *per capita*, to be paid to said grandchildren or their issue on attaining majority, each son takes a present estate subject only to be defeated on his death without issue, and such of said sons who had died since their father and before their mother leaving issue took and left a vested estate in the trust fund which in each instance escapes the further control of testator's will and as a part of the general estate of said sons, respectively, is governed by the Statute of Descent and Distribution.

PROCEEDING upon the judicial settlement of the accounts of a sole surviving trustee.

Jacob Brenner, for accounting trustee.

George V. Brower, for Kings County Trust Company as guardian of the estates of the children of David Godwin, deceased.

Kramer, Cohn & Meyer, for issue of Francis C. Godwin, deceased.

Frederick H. Cowden, for Agnes M. Godwin, as administratrix of David R. Godwin, deceased.

Henry C. DeWitt, for Reversionary Estates Company.

KETCHAM, S.—The will under this accounting is made contains a standard trust to pay the net income of the residue to the testator's wife during her life, and the further trust upon her death, fairly condensed to present the questions which have been submitted, is as follows:

“On the death of my said wife, I order and direct my said * * * trustees to pay over, divide and distribute all the said * * * residue of my estate * * * to and among the following persons, namely, * * * to my son John D. Godwin one fourth part thereof; to my son Allan W. Godwin one fourth thereof; to my son Francis C. Godwin, one fourth part thereof and unto my son David R. Godwin the remaining fourth thereof; should any one or more of my said sons die without leaving lawful issue him or them surviving, before such distribution and division is made, then and in that event the share or shares of him or them so dying shall be equally

divided among all my grandchildren then living share and alike: and in case of the death of any one or more of my said grandchildren dying leaving lawful issue him, her or them surviving, such issue shall receive the share, his, her or their parent would have taken if living, per stirpes and not per capita, to be paid to, had and received by such grandchildren or their issue as they severally attain the age of twenty-one years.

This will may be interpreted for every present purpose if it be determined that the testator's sons took vested remainders, although subject to defeasance in case of death without issue. If that determination be reached, then each son leaving issue was the owner of the remainder reserved to him and the same passes to his representatives or, possibly, according to the nature of the property, to his heirs at law.

It is argued that there is an implied gift of these remainders to the issue of any son dying with issue before the life tenant. It is sought to support this claim by the significant absence from the eighteenth paragraph of the will of any provision for a gift over in case of the death of a son, leaving issue; although the same paragraph in case of the death of a son, without issue, makes disposition of each of the remainder interests to all of the testator's grandchildren and is further solicitous for the destination of any fractional share in case of the death of a grandchild leaving lawful issue surviving him.

Whatever warrant for estates by implication may be found in the authorities, none of them indicate that a gift over can be inferred if by the inference a disposition to the issue should be imposed upon an absolute devise contained earlier in the will.

In *Matter of Vowers*, 113 N. Y. 569, the court, per Finch, J., says: "The rule of construction which seems to have prevailed is, that the inference from the will need not be irresistible or such as to exclude all doubts possible to be raised, but

must, nevertheless, be such as to leave no hesitation in the mind of the court, and must not rest upon mere conjecture. The intention must be clear so that no other reasonable inference can be made. * * * When his (the testator's) words leave no doubt about his intention and can have no other reasonable interpretation, we are justified in upholding a legacy by implication where no gift in express terms has been made."

In *Masterson v. Townshend*, 123 N. Y. 458, it is said: "Courts have, from an early day, repeatedly upheld devises by implication, where no gift of the premises seems to have been made in the will, in formal language (citing cases). They are justified in so doing whenever such a construction expresses what the testator manifestly intended to express."

In *Close v. Farmers Loan & Trust Co.*, 195 N. Y. 92, the court discovered an intention that the trust for the daughter, upon her death leaving issue, should enure to the benefit of her issue, though no such provision was found in the will, but this finding was plainly based upon the conclusion that the testator "did not give the fee or the principal to his daughter."

In *Matter of Moore*, 152 N. Y. 602, an estate by implication was found, but no question there arose as to whether or not such an estate could be imposed upon a will in contradiction of an express prior gift.

In *Matter of Hoffman*, 201 N. Y. 247, no need for the implication there made could have arisen if the estate which was the subject thereof had not been suspended upon contingency.

"The doctrine of enlarging estates by implication arises only in cases where the testator has himself left it uncertain what estate he intended to give. It is to further an unexpressed intention, and not to subvert a plainly expressed one, that the doctrine of enlarging estates by implication is resorted to." *Shreve v. Shreve*, 43 Md. 383.

The cases cited and many others either declare or recog-

nize the truism that the inference of a gift cannot be made where the result would be to defeat or impair an express disposition.

Hence, if in the case at bar the estate be by a prior gift vested in one of the testator's sons for every purpose and in every event except his death without issue, the implication not only should be avoided, but must be rejected, under the rigid rule: "Where one estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate." *Roseboom v. Roseboom*, 81 N. Y. 356; *Benson v. Corbin*, 145 id. 351.

The doctrine of implied gift can, therefore, be applicable only where the remainder is contingent and ultimate gifts are substitutionary. In no other case is there room for its use. That these remainders were vested, and not contingent, and that each son took a present estate therein, subject only to a defeasance in case of his death without issue, appears from many converging authorities.

It may be argued that the quality of contingency should be attached to a remainder in order to let in the implied gift to the issue of a deceased son where otherwise such issue might suffer from a neglect which the testator is presumed not to have intended. In the cases cited to support the theory of an implied gift to the issue the implication has been indulged only to repair a lapse in the will by which, except for the implication, the natural interests of the issue would have been ignored.

There would seem to be scant ground for any argument from the will at bar that the testator must have contemplated a gift over to issue. That argument would accord with practical righteousness and, therefore, suggest that the testator in-

tended a gift to the issue if, without it, the issue would be totally deprived of representation in the share originally assigned to their parent; but, in the will under examination, the remainder, if vested in one of the sons, would pass to his legal representatives or heirs at law and for the greater part thereof would beneficially reach the issue surviving him. There is in this case no such revolting misfortune to be escaped by construction as would thrust itself forward for correction if the issue were totally deprived of the estate in the absence of an implied gift.

A feature of the will not to be neglected is that in the event of a death among the testator's sons without issue there is not only a gift to all the grandchildren, but in the case of a death among them a gift over to the issue of such grandchildren, if any. Upon this provision there is erected the fair argument that the testator, thus thoughtful in one event for the issue of all his grandchildren, could not have meant to exclude the particular children of a single son who might happen to die before the life tenant, leaving such children; but the essence of this contention, as clearly stated by counsel, is that, unless the implication of a gift be made, the issue of a son would be wholly excluded; but no such abhorrent result will follow if the remainder of the son be vested, and, as shown *supra*, be held to go to the son's representatives, in larger part for the benefit of his children, or to them as heirs at law.

Without undue regard for the presumption in favor of the vesting of estates, or the appetite of the law for such construction as will avoid disherison of remaindermen, or intestacy or the lessening of an apparent devise to an heir at law (*Hersee v. Simpson*, 154 N. Y. 496; *Clark v. Cammann*, 160 id. 315, 326; *Connelly v. O'Brien*, 166 id. 406; *Matter of Russell*, 168 id. 169; *Trowbridge v. Coss*, 126 App. Div. 679, the vested character of the remainders in question seems plain.

In each instance there was a person "in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate." Real Prop. Law, § 40. The gifts in remainder were couched in a direction to divide and distribute in the future, but they were not so limited to a class that only those who might at the time of distribution fulfill the qualities of membership in such class were entitled to take.

In *Shangle v. Hallock*, 6 App. Div. 55, it is said, by Cullen, J., of the will there before the court, as follows: "The children among whom the division is to be made are mentioned by name. In this respect the present case is stronger than those of *Goebel v. Wolf* and *Matter of Tienken*."

In the *Godwin* will the devise is to four persons named and there is no room for the application of the rule that the gifts were dependent upon survivorship and the maintenance of a place in any class. The present case is clearly excluded from the rule that "Where the only words of gift are found in a direction to divide or pay at a future time, the gift is future, not immediate; contingent, and not vested." It is rather within the broad exception that, if the postponement of the payment is for the purpose of conveniencing the estate of the decedent and of letting in an intermediate estate under his will, the interest shall be deemed vested at the death of the testator and futurity shall not be annexed to the substance of the gift. *Matter of Young*, 145 N. Y. 535; *Matter of Crane*, 164 id. 71. The rule last stated is affirmed, though not applied, in *Matter of Crane*, *supra*.

It is probable, though by no means obvious from the cases, that the intermediate estate which by its intervention would indicate an intention that the distributees to take in the future shall receive a vested estate is only a particular estate carved out for the benefit of a life tenant upon whose death the divi-

sion is to take place and that a postponement for the benefit of one who himself is intended to share in the distribution, personally or by some form of representation, does not necessarily, if ever, intimate that the persons intended as distributees take a vested remainder.

Whether or not this distinction exists, the present will, by any criterion, does provide for a particular estate the maintenance of which is the sole cause for deferring the final division, and the postponement is clearly for the convenience of the decedent's estate and for providing means by which it can discharge the burdens which the trust for the life tenant imposes.

The construction to be carried into the decree of distribution is that the sons named in the eighteenth paragraph who have died since their father's death and before their mother's, leaving issue, took and left behind them a vested estate in the fee or fund of the trust, and that such estate, in each instance, escapes the further control of the father's will and as a part of the general estates of the sons respectively is to be governed by the Statute of Descent and Distribution.

Decreed accordingly.

LOSS.

EFFECT OF CANCELLATION, OR DESTRUCTION OF ONE OF DUPLICATE OR TRIPLICATE WILLS.

If a testator, who has executed a will in duplicate, cancels or destroys one part, the presumption is that he meant thereby to revoke the will. *Crossman v. Crossman*, 95 N. Y. 145; *Biggs v. Angus*, 3 Dem. Surr. 93; *Farr v. O'Neill*, 1 Rich. (S. C.) 80.

And this is so, whether the other part is deposited with some other person. *Richards v. Mumford*, 2 Phillim. 23.

Or is in the testator's possession. *Pemberton v. Pemberton*, 13 Ves. Jr. 290.

But where the duplicate is in the testator's possession, the presumption is weaker. *Pemberton v. Pemberton*, 13 Ves. Jr. 290.

It has even been held that if a testator, having both parts in his possession, alters one, and then destroys that which he has altered, a presumption of revocation, although slight, arises. *Pemberton v. Pemberton*, 13 Ves. Jr. 290.

Where one copy of a will, executed in duplicate, was destroyed by testatrix, *animo revocandi*, and there was no proof that the other was not still intact, it was presumed that the destruction of the one paper was intended to nullify the other. *Asinari v. Bangs*, 3 Dem. Surr. 385.

Where a will is executed in duplicate, each expresses testator's will, and either may be proved and admitted to probate, without the other. *Crossman v. Crossman*, 95 N. Y. 145.

REVOCATION OF WILL BY SUBSEQUENT BIRTH OF ISSUE.

At Common Law.

At common law the birth of a child does not revoke a will made after marriage, since a married testator may be presumed to contemplate such an event. *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Brush v. Wilkins*, 4 Johns. Chancery, 506; *Mundy v. Mundy*, 15 Ohio Cir. Ct. 155; *Ordish v. McDermott*, 2 Redf. Surr. 460.

In Iowa the common law was repudiated at an early date. It was uniformly held that the birth of a child of the testator operates as an implied revocation of a will before made. *Alden v. Johnson*, 63 Iowa, 124.

This principle has been extended to illegitimate children notoriously recognized by their father, who under the statutes of this state, inherit from the father share and share alike as his legitimate children. *Milburn v. Milburn*, 60 Iowa, 411.

Under the Roman law the subsequent birth of a child alone operated as the revocation of a will. *Sutton v. Hancock*, 115 Ga. 857.

The will of a wife, enclente when executed, which fails to provide for, or exclude, the unborn child from participation thereunder, is, under the common law, revoked by the birth of the child. *Pearce v. Carrington*, 124 S. W. 469.

Under Statutes of Other States.

Under statutes the common law has been greatly modified by the various statutes of descent and distribution, and in other jurisdictions statutes, varying in their wording, have been enacted, by the provisions of which a will is revoked in toto by the birth of a child after the execution of the will. *Fry v. Fry*, 125 Iowa, 424.

Statutes have also been enacted providing that a will is revoked in toto by the birth of a child after execution of a will, where no provision is made in the will for such child. *Sutton v. Hancock*, 115 Ga. 857.

And under the statutes of one state it has been held that the will is revoked in toto by the birth of a posthumous child, where no provision is made in the will for the child, or it is not mentioned in such a way as to show an intention to make such provision. *Rhodes v. Weldy*, 48 Ohio St. 234.

Under Statutes in New York.

The will of a married woman, executed pursuant to the statute, is not revoked by the subsequent birth of children, who are left wholly unprovided for. *Cotheal v. Cotheal*, 40 N. Y. 405, over-ruling *Plummer v. Murray*, 51 Barb. 201, and *Loomis v. Loomis*, 51 Barb. 207.

A seaman's will, executed in 1813, was held to be revoked by the subsequent birth of children, and entire change of circumstances, and an unexecuted paper, drawn by him, in the form of a will, in 1840. *Sherry v. Lozier*, 1 Brad. 437.

Under the revised statutes (2 Rev. St. 64, s. 42) there can be no implied revocation of a will by other means than those specified; a will made in ignorance of the existence of a living child is not revoked, even at common law, by the discovery of its existence. *Ordish v. McDermott*, 2 Redf. 460.

An only child, born after the execution of a will, takes the same interest in the testator's real and personal property as if he had died intestate. *Smith v. Robertson*, 24 Hun, 210, 89 N. Y. 555.

The birth of a post-testamentary child is no ground for refusing the probate of a will. *Matter of Bunce*, 6 Dem. 278; *Matter of Huie*, 6 Dem. 352.

A subsequent birth of an illegitimate child does not work a complete revocation of the mother's will, or defeat its probate; such probate was held not to estop the child from subsequently bringing an action to recover its rights, and where the property is all personal, it was held to be unnecessary that the probate be first revoked. The rule would have been otherwise, however, if legitimate issue were in existence. *Bunce v. Bunce*, 20 Civ. Pro. 332, 14 N. Y. Suppl. 659.

Where the will of a testatrix fails to provide for a child, born after the making of a will, it is in all respects valid, except as to such child, which succeeds to the same portion of the estate, as he would have taken, in case of his mother's intestacy. *Luce v. Burchard*, 78 Hun, 537, 60 St. Rep. 770.

Where a married woman executed a will in this state, and afterwards had two children here, and then removed to Rhode Island, where she had another child, and died a resident of that state, and her entire property consisted of personal property in this state, and the laws of both states provide that upon the birth of a child, after the making of a will, such child shall have the same interest as if the parent died intestate, and the testatrix left a husband, who, under the laws of both states would, in case of intestacy, have taken the whole of the personal estate, but the will disposed of all her personal property, it was held that the children would have taken nothing had the mother died intestate, and were therefore entitled to no part of the bequeathed estate, but it should be distributed in accordance with the terms of the will. *Matter of Witter*, 2 Connolly, 530.

Where the beneficiary under a will died prior to the time for distribution, and left a will which contained no provision for a child born after she made it, it was held, that such child had an interest in the first estate, and that it, and the representative of the deceased beneficiary, were proper parties to an accounting by the testamentary trustees under the first will. *Matter of Smith*, 68 Hun, 530, 52 St. Rep. 772; affirmed in 139 N. Y. 611.

The birth of a child after the making of a will does not operate to revoke the will, but it merely renders the will inoperative as to that portion of the estate which would have been distributed to the child if the

parent had died intestate; in such case, letters testamentary are properly issued to the person named as executor. *Matter of Murphy*, 144 N. Y. 557.

Where a child is born after his mother had made her will without providing for him, he is entitled to such portion of her estate as would have descended to him had she died intestate. *Davis v. Davis*, 27 Misc. 455, 59 N. Y. Suppl. 223.

**Matter of the Appraisal of the Estate of JOEL W. EATON,
Deceased, Under the Acts in Relation to Taxable Transfers
of Property.**

(Surrogate's Court, Albany County, January, 1918.)

**TAXES—TRANSFER TAX—EXEMPTION FROM—REMAINDER AFTER LIFE ES-
TATE CONSTRUED AS VESTED.**

A bequest of a residuary estate to the legal heirs of testator, at the death of the life tenant, is a vested remainder, and where the interest of one of said legal heirs, a brother of testator, is appraised at less than \$5,000, it is exempt from a transfer tax, as is also the interest of the nephews and a niece of testator, the other legal heirs, the share of each being less than \$1,000.

APPEAL from a determination made by the transfer tax appraiser to the surrogate under section 232 of the Transfer Tax Law.

Mills & Mills (Borden H. Mills, of counsel), for the appellant.

John F. Brady, for state comptroller.

VAN DERZEE, S.—The controversy in this case rests upon the construction of this testamentary disposition: "Fourth. I hereby give, devise and bequeath to said Helen F. Jerome the use and benefit of all the rest and residue of my estate, both real and personal, so long as she shall live, and at her death I give, devise and bequeath said rest and residue to my legal heirs, in such manner and proportions as the laws of the state of New York shall direct."

The transfer tax appraiser interprets this clause as meaning Helen F. Jerome has a life estate in the portion of the estate described in this bequest and the remainder is now uncertain because of the language used, and has assessed the tax accordingly.

In determining the issue presented we must ascertain the purpose of the testator from the entire instrument. It will be observed the testator created no trust by his will. He bequeaths a life estate to Helen F. Jerome and provides "at her death" the property shall be distributed to the legal heirs according to the laws of the state of New York.

The point of the case is this: Is the remainder devised and bequeathed to the legal heirs of the testator a vested or contingent remainder?

The rule is well settled that a remainder is not in any case to be considered as contingent when it may be vested consistently with the intention of the testator. Words or phrases denoting time in a bequest of a remainder, limited upon a particular estate determinable upon an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting. *Hersee v. Simpson*, 154 N. Y. 496.

In the case cited we have a situation analogous to the one before me. The testator devised a life estate to his wife, and provided that "from and after her decease" the property should be disposed of according to the statutes governing the descent of real property, and the court said: "The general policy of the law favors a construction which includes the vesting of estates and consequent certainty in respect to the title to property, and which prevents the disinheritance of the issue of a remainderman who may die during the existence of the precedent estate. This principle is based upon the idea

that, in the absence of express words, it cannot be supposed that such was the intent. When we apply to this provision (quoted above) the rule stated, it becomes manifest that his heirs upon his death took a vested remainder."

I am of the opinion the transfer tax appraiser erred in his construction of the bequest, in holding that the remainder to the heirs of the testator was contingent and not vested, and it follows the tax imposed upon such interpretation must be set aside. Any other result would defeat the manifest design of the testator.

The residuary estate having been found to amount to \$9,312.50, Homer E. Eaton, a brother of the testator, has a vested remainder of the value of \$4,656.25, and this is exempt from taxation. The other beneficiaries of the remainder are nephews and niece of the testator, and, as the share of each is \$931.25, they also are in the exempt class.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of
LILLIAN M. LANE, Deceased.**

(Surrogate's Court, Kings County, January, 1913.)

WILLS—HOLOGRAPHIC—CONSTRUCTION OF BEQUESTS UNDER.

A bequest, by a holographic will, to A or his child, of a specified interest in certain real estate, is effectual as a gift to A or his child or children, in case A dies before the testatrix.

Where such testatrix devised certain real estate to B in trust for B's children, with directions that B should have the income for life, the gift is to B with remainder to her children.

A bequest of the deed of certain real estate is no more than a gift of said instrument, and a pecuniary legacy given by the same clause of the will is primarily payable from the personal estate.

See Note, 1 Mills, 138.

PROCEEDING upon the probate of a will.

A. J. Keogh, for Lillian Lane Kelly, executrix and proponent.

Dexter, Osborn & Fleming, for Mabel Hassell, Florence G. Hassell and Erwin E. Hassell.

Cornelius Doremus, for Walter A. Lane.

A. C. Mayo, for Katherine Lane Gorham, Edith Gorham and Geneva Gorham Wall.

Joseph A. Keenan, special guardian for Lillian G. Kelly, an infant.

John F. Canavan, special guardian for Marian Kelly, Ethel Kelly and Helen Kelly, infants.

KETCHAM, S.—The will is in the handwriting of the testatrix

and its phrases, though borrowed from legal examples, are almost unintelligible. Its first paragraph, the form of which is reproduced in later provisions, is as follows:

"First. I give and bequeath to Walter A. Lane, or his child, one quarter interest or share, in the house No. 46 Fourth place, in the city of Brooklyn, N. Y."

There are several paragraphs, of which the following is a type:

"Fourth. I give, devise and bequeath, to my Goddaughter, Lillian Lane Kelly, The deed, with one quarter interest or share of the house No. 46 Fourth place, City of Brooklyn, to be held by her, in trust for her children the use and interest of it, to be hers during her lifetime."

The seventh and eleventh paragraphs are as follows:

"Seventh. I give, devise, and bequeath, to my dear little God-daughter, Lillian G. Kelly, Two thousand dollars, with deed of No. 18 Fourth Place, City of Brooklyn, N. Y. The interest of same to be used by her if necessary. This money represents the legacy left me by my grandmother, Mary Lane, and I leave it to the one who truly loves me, for myself."

"Eleventh. All the rest and residue of my estate, to be invested in No. 18 Fourth Place, the interest of same, after expenses of keeping the property are paid, to be given to Lillian Gorham Kelly, during her lifetime. The principal to be divided among her heirs."

There is then an appointment of two executors.

There is but one construction which will save the first paragraph from utter failure. Unless it can mean a devise to the parent named, and in the alternative to his child in case of his death, no effect can be given either to the particular provision or to five other attempted gifts in the will.

Each of these efforts of the testatrix to make a disposition of her estate must be indulgently regarded, and the first com-

manding thought is that nobody can sanely doubt that the testatrix meant to make gifts in each case to a parent if he survived her and to his child or children if he did not so survive. Language which would be understood by all mankind to be adequate to a given result must not only be taken to represent a subjective purpose in the mind of the testator but must be considered as a sufficient record of such purpose.

It will be found that these gifts did not fail, but they can be effectuated as gifts to the legatee named, or to his child or children in case of his death in the lifetime of the testatrix.

The devise to one to be held in trust for his children, with a direction that the legatee named shall have the income during his life, must be construed as gifts to the person first named for life, with remainder to his children.

In the seventh paragraph, the gift of the deed to premises mentioned can be no more than a bequest of the instrument. In grammatical effect, that is all that it can mean, and in the vocabulary of the testatrix, as established in two other paragraphs of the instrument, it is given that meaning unquestionably.

The legacy of \$2,000 in the seventh paragraph is primarily payable out of the personal estate. There is no word or intimation in the will by which it is charged upon the real estate.

In the eleventh paragraph there is an implied trust and, therefore, a devise in trust to the executors named, under which they are to take possession of the residue, including the house, 19 Fourth place, invest the same in the house mentioned, pay the expenses of keeping the property, pay the income to the person named during her lifetime and the principal of the residue is to be divided equally among the heirs of the life tenant.

The decree of probate will embody a construction accordingly.

Decreed accordingly.

Matter of the Estate of HOWARD KUTTER, Deceased.

(Surrogate's Court, New York County, January, 1913.)

EXECUTORS AND ADMINISTRATORS—REVOCATION OF LETTERS OF ADMINISTRATION—OBTAINED BY FALSE SUGGESTION.

MARRIAGE—REMARRIAGE OF ONE HAVING A HUSBAND LIVING—VOID AB INITIO.

Letters of administration obtained by a false suggestion must be revoked.

At common law, the remarriage of one having a husband or wife actually living, though unheard of for years and believed to be dead, was void *ab initio*.

Where a wife, not having heard from her husband for over seven years, was married to decedent in the state of New Jersey, letters of administration issued to her as his widow will be revoked on the presumption that in the absence of proof the common law prevails in the state of New Jersey.

APPLICATION under subdivision 4, section 2685 of the Code of Civil Procedure, to revoke letters of administration obtained by an alleged false suggestion.

Howard S. Kinney (James B. Fox, of counsel), for appellant.

John F. Valicant, opposed.

FOWLER, S.—This is an application under subdivision 4, section 2685, Code of Civil Procedure, to revoke letters of administration obtained by an alleged false suggestion. The administratrix received the letters of administration as widow of Howard Kutter, deceased. She alleged and now insists that she is such widow. This is denied by the mother of the deceased, who petitions to revoke the letters. The issues of

fact came on for hearing before me. It was then established that the administratrix was married to one Horton in May, 1900. In or about the year 1901 Horton disappeared, and was not known to administratrix to be living in November, 1908. In 1905 the administratrix entertained the idea of divorcing Mr. Horton, but could not find him. Not hearing from Horton in more than seven years, the administratrix married the deceased Mr. Kutter in November, 1908, in the state of New Jersey. At that time the precise domicile of the deceased and the administratrix is not very clear, but the evidence points to New Jersey. In May, 1910, Mr. Horton reappeared at the home of Mrs. Kutter in the city of New York, and Mr. Kutter then saw him and sent him away with the statement to Horton in effect, that the administratrix was now Mrs. Kutter. Mr. Horton seems to have acquiesced in his statement so far as to disappear again without contradiction. The only question before me is the effect of her marriage to deceased on the title of the administratrix to the letters of administration. Is she or is she not the widow of the deceased Mr. Kutter, so as to entitle her to letters of administration?

Had the marriage of administratrix to the deceased taken place in the state of New York the question here would be very different. Under the law of this state the remarriage of a person whose husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time is not void, but voidable (2 R. S. 139, § 6; Dom. Rel. Law, § 6, Laws of 1909, chap. 19, formerly Laws of 1896, chap. 272, § 3), and such a second marriage subsists until death or an adjudication avoiding it, and this is so even if it transpires that the disappearing spouse of the prior marriage reappear (*Stokes v. Stokes*, 198 N. Y. 301, 305), unless there is bad faith apparent in the new marriage. *Gall v. Gall*, 114 N. Y. 109; *Jones v. Zoller*, 29 Hun,

551. In the absence of bad faith the validity of such a second marriage cannot be questioned collaterally (*Cropsey v. McKinney*, 30 Barb. 48; *Matter of McKinley*, 66 Misc. Rep. 126; *Taylor v. Taylor*, 25 id. 566; *Griffin v. Banks*, 24 How. Pr. 213, reversed on other grounds, 37 N. Y. 621), and after the death of the disappearing spouse of the former marriage it would seem not at all. *Combs v. Combs*, 17 Abb. N. C. 265; *Stokes v. Stokes*, 198 N. Y. 301, 304. But this condition of the matrimonial law is the effect of the statutes of this state. At common law the remarriage of one having a husband or wife actually living although unheard of for years and believed to be dead, was void *ab initio* (*Fenton v. Reid*, 4 Johns. 52, 53; *Williamson v. Parisien*, 1 Johns. Ch. 389, 393; *Price v. Price*, 124 N. Y. 589, 596), as the old statutes relieving him or her from the penalties for bigamy did not validate the subsequent marriage contract, even if contracted under an honest mistake of fact. *Fenton v. Reid*, *supra*; *Price v. Price*, *supra*; *Schouler Dom. Rel.*, § 21.

But the marriage of the administratrix to the intestate Kutter did not take place in this state; it took place in New Jersey. Its validity is to be determined there by the law of the state of New Jersey. *Van Voorhis v. Brintnall*, 86 N. Y. 18. In this respect *locus regit actum*, and, if valid in New Jersey, the marriage is valid everywhere. *Story Confl. Laws*, §§ 85, 89, 103; *Wheat*, 141; *Hynes v. McDermott*, 91 N. Y. 451, 457. If not valid there, it is not valid here. Now, the common law is presumed to be in force in New Jersey, and the statutes of this state have, of course, no extraterritorial effect there. No proof has been made before me of any statute of New Jersey altering the common law, and the surrogate cannot take judicial notice of the statutes of New Jersey. The presumption is that the common law prevails in New Jersey, when no statute altering it is proved as a fact. *Vanderpoel v.*

Gorman, 140 N. Y. 563, 568; First Nat. Bank v. Nat. Broadway Bank, 156 id. 459, 472; Robb v. Washington & Jefferson College, 185 id. 485, 496; Monroe v. Douglass, 5 id. 447; Electro-Tint Engraving Co. v. American H. Co., 130 App. Div. 561.

At common law the marriage of the administratrix to Kutter was absolutely void, if she then had a husband living. The proofs show that she then had a husband living. This being so, there is no escape from the conclusion that the present administratrix of intestate is not and was not the widow of the intestate Kutter at the time she applied for letters of administration upon his estate. The suggestion by which the administratrix obtained such letters was, therefore, false when made. *Kerr v. Kerr*, 41 N. Y. 372. This being so, the letters in question must be revoked.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of Proceedings of ELLY SMITH, as Administratrix of LUCIUS HOPKINS SMITH, Deceased.

(Surrogate's Court, New York County, January, 1913.)

DEPOSITIONS—SURROGATE'S COURT—LETTERS ROGATORY TO THE GERMAN EMPIRE—CODE. CIV. PRO. § 913.

There being no provision of law in the German Empire for taking testimony by commission, letters rogatory may issue in a proper case under section 913 of the Code of Civil Procedure to the officials of said Empire, but without prejudice to any objections to the relevancy, materiality or competency of the proposed interrogatories, or the answers thereto, all such matters being reserved.

Merrill & Rogers (Payson Merrill and Alfred Holbrook, of counsel), for applicant.

Bernard Gordon Rounds, Schurman & Dwight and Martin J. Keogh, Jr. (George W. Schurman, of counsel), opposed.

FOWLER, S.—This is an application for letters rogatory to take the testimony of the Right Honorable the District Court Judge of the Royal Court at Berlin, Prussia, who is alleged to have approved the adoption by intestate of the young German girl now known as Ruth Hopkins Smith. The brother of intestate, Sidney A. Smith, disputes the validity of the adoption and asks for letters rogatory in aid of his contention. The application for the letters is opposed by the administratrix and by Ruth Hopkins Smith for various intricate reasons. It is apparent that Ruth Hopkins Smith is claiming in this court to be entitled as such adopted daughter, under the Statute of Distribution of this state as now amended, to the larger part of the funds now in the hands of the administratrix for distribution. The brother of the intestate disputes the right and claim of the adopted daughter, and the issue is now here awaiting the decision of this court. The estate is large, and the several rights of the respective contestants will depend wholly on the conclusiveness of the adoption or arrogation in question. A claim to the estate of an intestate solely by virtue of a disputed foreign act of arrogation certainly demands consideration at our hands, and any competent testimony bearing upon the validity or invalidity of such act will be of consequence. At this stage the surrogate ought not to hold that none of the evidence sought is competent. A denial of the present application would be equivalent to just that decision, whereas our decision on the competency of the testimonial evidence should await, in this matter, the return to the letters rogatory unless

the proposed evidence is clearly irrelevant or incompetent. As I do not know what the honorable judge may testify, I am not disposed to prejudicate the case.

It is the constant practice of this court to issue letters rogatory to officials of the German Empire, as ordinary commissions to take dispositions of witnesses in Germany are not *ex comitate* executed freely or at all in the German Empire. There seems to be no provision in Germany for such commissions. It would appear that the applicant for letters rogatory has brought himself *prima facie* within section 913, Code of Civil Procedure. The letters rogatory will not necessarily run to the honorable judge whose evidence is desired. They will be in the usual form, I take it, and addressed generally to the courts and magistrates of a friendly power.

It ought not to be held at this stage that none of the desired testimony of the honorable judge is material or competent. The question is too serious for such a disposition. It would seem to me that the adjudications cited against the application are not quite in point. The foreign judge is to be asked as to matter of fact and not as to matter of law. I cannot assume that the honorable judge of the German tribunal will suffer himself to be interrogated as to matters of law or matters irrelevant to the issue before me or incompetent under our laws of evidence. It may be as asserted that the German judge will decline to answer the written interrogations to be propounded to him by virtue of the letters that the German judge will decline to answer the written interrogations to be propounded to him by virtue of the letters rogatory. He may regard them as *extra modum*. If he so thinks, he is not obliged *ex comitate* to violate his own conception of the judicial proprieties or to compromise his judicial dignity. He will in that event, I take it, simply decline to answer the interrogatories propounded. If he shall, on the other

hand, be willing or able to make answer to such interrogatories, the competency of his evidence both *modo et forma* will then have to be decided by us under the *lex fori contentions*. On all such matters decision I think should be reserved at this stage of this cause and the cause should not be prejudicated.

It may be that some of the interrogatories to be propounded to the German judge will relate to matters not evidentiary under the *lex fori*. But at this stage it does not seem to the surrogate that this is a reason for denying the application altogether, for it may be that the honorable judge of the German court will or can testify to matter competent or material under the *lex fori*.

Application for letters rogatory granted, but without prejudice to any objections to the relevancy, materiality or competency of the proposed interrogatories or the answers thereto. All such matters will be reserved.

Decreed accordingly.

Matter of the Judicial Settlement of Account of Proceedings of BAINBRIDGE W. BURDICK and Others, as Executors of the Last Will and Testament of NORMAN BURDICK, Deceased.

(Surrogate's Court, Albany County, January, 1913.)

EXECUTORS AND ADMINISTRATORS—DIRECTIONS TO, UNDER WILL—ACCOUNTING—RETENTION BY, OF CORPORATE STOCK—COSTS—PAYABLE BY EXECUTOR PERSONALLY.

Where, on the judicial settlement of the accounts of a son as executor of his father's estate, payment of a claim allowed by him on a note held by a bank, which represented in part an indebted-

ness of a partnership between him and his father which had existed for several years prior to the latter's death, is objected to by the sister and co-executor of the accounting party on the ground that the note being a partnership obligation the estate was not liable thereon until all legal remedies against the partnership or the surviving partner had been exhausted, and it appears from the evidence that at the death of testator he and said son were equally liable on the note, which in one of the schedules was described as a partnership debt, the claim will be disallowed and the account of the executor surcharged with the amount paid by him to the bank, out of the funds of the estate, on the note, with interest to date.

Where the will of testator directed his executors to call in and collect from his son on account of his promissory note or notes held by testator sufficient money to promptly pay all cash bequests and after payment thereof from the proceeds of said note or notes the balance was bequeathed equally to testator's son and daughter, the son as executor must account for, as cash, the amount due on his unmatured personal note for \$40,000 with interest, and upon failure so to do he will not be allowed to retain a legacy of certain corporate stock which he had transferred to himself soon after the grant of his letters testamentary, and the decree judicially settling his account will order and direct him to restore to the estate said stock, together with all dividends paid to him thereon, and that said stock shall not be again transferred until the further order of the court.

Costs on such judicial settlement allowed to the contestant, to the special guardian, and to all parties appearing therein, to be taxed on notice and to be paid by the accounting executor personally.

PROCEEDING upon the judicial settlement of the accounts of executors.

H. & W. A. Hendrickson for executor B. W. Burdick.

A. Page Smith, for Ethel Wygant, executrix and contestant.

Beecher S. Clothier, for certain legatees.

J. E. Sennett (Daniel J. Dugan, of counsel), for certain legatees.

VAN DERZEE, S.—Bainbridge W. Burdick, Ethel B. Wygant and Emma E. Clark, the three persons named executors of the last will and testament of Norman Burdick, deceased, filed an account of their proceedings in this court, verified by all of them. Thereafter, one of the executors, Ethel B. Wygant, asked leave to file objections to the account, alleging she had signed the same under protest and against her will, to avoid trouble with her brother, Bainbridge W. Burdick, who threatened to impose financial loss upon her if she refused to accede to his wishes and management of the business of the estate. Permission to contest the account was granted to Mrs. Wygant and she has filed objections raising for our determination issues of considerable importance.

Other legatees have also appeared herein by attorney and filed objections to the account.

The contest is almost entirely between Bainbridge W. Burdick and his sister, Ethel B. Wygant. Mr. Burdick has had practically sole charge in the management of the business of the estate, retained the attorneys to act, attended to the making of the inventory and prepared the account without any considerable, if any, suggestion from his coexecutors. The situation then before us is really an accounting by Bainbridge W. Burdick, with objections thereto by his sister, Mrs. Wygant.

There appears in the schedule of claims allowed but not paid by the executors, the following: "First National Bank of Albany, note dated March 31, 1908, for the sum of \$50,000, made by Burdick & Son (the partnership) one-half of which is chargeable to said estate, \$25,000. Interest to February 1, 1910, \$250. Interest to be added to date of payment."

Mrs. Wygant objected to payment by the executor of any

part of this note out of estate funds, for the reason that it was not a proper claim against the estate and could not be considered as a claim at this time.

The First National Bank appeared by attorneys. After objections were filed, the bank's attorneys announced they would ask no consideration of their claim by this court; that the note was a partnership obligation and they had other and sufficient remedies for collecting the amount due thereon. Thereafter Bainbridge W. Burdick paid the amount due on the note to the bank and presented a claim for \$25,000 and some interest on account thereof.

Mrs. Wygant objected to payment of this claim upon the ground, principally, that the note was an obligation of the firm of Burdick & Son, the partnership, and there was no liability on the part of the deceased member's estate until legal remedies had been exhausted against the partnership assets or the surviving partner.

The indebtedness represented in part by this note had existed for several years prior to the death of the decedent and this particular note was the last of several renewals for a portion of the same indebtedness. Money was borrowed from the First National Bank in 1904 and 1905 to repair and improve real property owned by Bainbridge W. Burdick and Norman Burdick and used by them in conducting a business as copartners under the name of Burdick & Son. In 1905 a corporation was formed under the name of Burdick & Son, Inc., to conduct the same business upon the same premises in which the copartners had theretofore been engaged. At that time, the machinery and some, but not all, of the assets of the copartnership were transferred to the corporation. Bainbridge W. Burdick declares the partnership was dissolved in 1905, at the time the corporation was formed, and was not in existence thereafter; that this note is in fact a joint obliga-

tion of the decedent and himself, upon which each was at the time of the death of Norman Burdick liable for an equal share.

I do not think the testimony before me supports the claims of the executor, nor do the probabilities indicate such purpose. Whatever may have been the arrangements between the members of this copartnership in relation to other matters at the time the corporation was formed, it is clear to me that it was the purpose and understanding of the partners to continue the partnership agreements in respect to the indebtedness represented by this \$50,000 note, and also in respect to other matters. Mr. Burdick in giving his version of the situation admitted having performed several transactions indicating the life of the partnership after he claimed it had been dissolved. He was asked if his act in making the note on March 31, 1908, and signing the name of Burdick & Son thereto was a copartnership act. His reply was: "It was not a copartnership act between ourselves, but would probably be understood or accepted as such by the bank." The bank certainly considered the note a partnership obligation and treated the proceeds thereof as partnership assets. It seems to have been the purpose of Mr. Burdick on the 31st of March, 1908, to give the bank to understand it was a partnership obligation. It was made in form of signature exactly like previous notes and checks of the firm had been made on many occasions and by the same person. Mr. Burdick testified this note was given "to replace a partnership note the same as the original note."

In schedule D of the account, where mention is made of the note, it is described as a partnership indebtedness. If there had been any intention on the part of the decedent in his lifetime to change the character of his liability upon this note, it would have appeared upon its face. The amount is large; the transaction was among men trained in business methods and of presumed technical ability. If it had been the intention of

the bank authorities and the Burdicks to have this a note of joint and several individual liability, it would have been executed in such form and not as it now appears.

There are other evidences of the continuation of the copartnership. Taxes on the factory property were paid in the years, 1905, 1906 and 1907 by checks signed Burdick & Son; all after the alleged dissolution of the firm. The conclusion is irresistible that the copartnership was not dissolved in 1905 and, in so far as this note is concerned, existed at the time of the death of the decedent.

The surviving partner, having paid the firm debt which he claims was in part chargeable to the decedent, is, at most, entitled to be subrogated to the rights of the creditor. It does not appear that the remedy at law upon the note has ever been attempted.

The rule is laid down in *Pope v. Cole*, 55 N. Y. 124, as follows: "To enable a creditor to collect his debt in equity from the estate of a deceased joint debtor, he must show that he could not collect it by proceedings at law against the surviving partner. * * * Until it has been demonstrated that there is no legal remedy, a creditor may then avail himself of the equitable liability of the estate of the deceased joint obligor."

The claim of Bainbridge W. Burdick is, therefore, rejected and disallowed and his accounts surcharged with the sum of \$3,000 interest paid to the bank out of the funds of the estate on said note, together with interest thereon to date.

Among the assets of this estate is a note of Bainbridge W. Burdick, dated January 2, 1907, payable January 2, 1914, for \$40,000. During the course of administration Mr. Burdick attempted to convert this note by selling it at public auction. Upon the application of Ethel B. Wygant an order was made enjoining and restraining a sale or other disposition of this

note until the further direction of this court. An appeal was taken to the Appellate Division of the Supreme Court, which tribunal affirmed the order of this court.

The fifth clause of the codicil to the will of the decedent is as follows: "*Fifth.* I order and direct my executors to call in and collect from my son Bainbridge W. Burdick on account of his promissory note or notes which I hold, sufficient money to promptly pay all the cash bequests made by me in my said will and in this codicil and after paying said bequests from the proceeds of said note or notes, I give and bequeath the balance of said note or notes and the moneys represented thereby equally to my son Bainbridge W. Burdick and my daughter Ethel Wygant share and share alike."

It does not appear that there were any notes due the decedent from Bainbridge W. Burdick, other than this note of \$40,000. There are numerous bequests in the will of money and particular things such as jewelry, horses, etc., to friends and employees, approximating \$19,000. None of these legatees has received his bequest, for the reason, as stated by Mr. Burdick, that he believed the estate insolvent.

Five hundred shares of the capital stock of Burdick & Son, the corporation, were bequeathed to Bainbridge W. Burdick by the will of the testator. Soon after the letters were issued herein, these shares of stock were transferred to Bainbridge W. Burdick and he has received the dividends thereon ever since. The exact value of this stock does not appear, but it is conceded to be large.

The contesting executrix insists that this \$40,000 note and the interest due thereon should be treated as cash in his hands as executor and that a lien should attach to his legacy until the amount of the promissory note has been distributed according to the terms of the will.

Section 2714 of the Code of Civil Procedure, after describ-

ing what the inventory of a decedent's estate should contain, proceeds as follows: "The naming of a person executor in a will does not operate as a discharge or bequest of any just claim which the testator has against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal property of the deceased."

Counsel for the executor insists this section does not apply, for the reason the debt has not yet become due. Such a construction of this statute is altogether too narrow. To say that an executor who is also a legatee is entitled to the enjoyment of his own legacy while he retains in his hands a part of the estate out of which other legacies are directed to be promptly paid violates conscience and offends ordinary principles of equity.

It is the rule of law that an executor has no right to pay either himself or any other legatee any portion of a legacy until he has first collected the amount of their respective debts to the estate. In such case the executor has a lien and right of detention upon the legacy sufficient to pay the indebtedness to the estate. When the debt is due from the executor to the estate, it is the duty of the court which gives consideration to his accounts to see that it is applied to the legatee who happens to be the accounting party. It is not a mere question of legal offset, but of equitable lien and right of retainer, and the right depends upon the principle that the executor is not entitled to his legacy while he retains a portion of the estate distributable to others.

The executor should have accounted for the amount due of principal and interest on his note as cash in his hands. Hav-

ing failed to do that, he cannot be allowed to retain the benefits of his own legacy which he has appropriated. The decree to be entered herein should provide and in it Bainbridge W. Burdick should be directed to restore to the estate the certificates of stock of Burdick & Son which were bequeathed to him under the will, together with any and all certificates of stock issued to him as dividends thereon and also all cash dividends declared and paid to him thereon, and that said stock shall not be again transferred until direction is given by this court.

The account must also be surcharged \$3,000, one-half rent for the factory property due the decedent on March 31, 1908, which was received by the executor and for which he is not charged in the account, together with interest thereon from April 1, 1908. The portion of rent due the estate for the month of April and one-half of May, 1908, appears not to have been paid to the executor and doubtless will be accounted for hereafter.

Objections have been filed by several legatees to many items of the account. It was necessary for them to appear and oppose the claims of the executor to protect their interests. The manner in which the executor has attempted to deprive every person who derives an interest in this estate of the benefit which the testator intended they should enjoy made it necessary for the legatees to secure the aid of counsel to protect their interests. Consideration of these objections in detail is now unnecessary, because the estate is solvent. The residuary legatee presents no question to the apparently extravagant burial and monument or other items contained in objections filed by the legatees and the interest of the specific legatees will upon the determination already made be fully protected. I deem these parties successful contestants within the provisions of the statute and will allow to all of them costs in this proceeding. This controversy throughout has been occasioned en-

tirely by the avaricious conduct of the executor in an attempt to get all of this estate he could for his own benefit and to inflict discomfort and annoyance upon his sister, Mrs. Wygant, and to deprive other legatees of their legacies.

The will bequeaths amounts varying, according to service, to employees of the decedent. The executor declared he did not know who these persons were, nor had he made effort to determine. These legatees must be paid, as well as the legatees of particular bequests mentioned in the will.

The horse given to Ralph Mills by the second clause of the codicil was the property of the decedent at the time of his death and must be delivered to him. This horse is included in the inventory as an asset of the estate and among the expenses of administration set forth in the account are charges for the care and keep of said horse. The harness and wagon mentioned in this bequest do not appear to have been in possession of the decedent at the time of his death.

Costs will be allowed to Ethel B. Wygant, the special guardian and all the parties who have appeared herein, to be taxed on notice and to be paid by Bainbridge W. Burdick personally.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of the LONG ISLAND LOAN AND TRUST COMPANY as Trustee Under a Trust for the Benefit of LILLIE G. SLOAN Created by the Last Will and Testament of STEPHEN GARRETSON, Deceased.

(Surrogate's Court, Kings County, January, 1913.)

EXECUTORS AND ADMINISTRATORS—COSTS AND EXPENSES OF ANNUAL ACCOUNTING—ANNUAL ACCOUNTING OF TRUSTEE.

The costs and expenses of an annual accounting by a testamentary trustee should be borne by the income unless they have been incurred in the administration, preservation or increase of the principal.

PROCEEDING upon the judicial settlement of the account of a trustee.

George S. Ingraham, for accounting trustee.

Charles D. Ridgway, special guardian for infant remaindermen.

KETCHAM, S.—In an annual accounting of a trustee the costs and expenses should be borne by the income unless they have been incurred in the administration, preservation or increase of the principal.

The cases of *Chisholm v. Hammersley*, 113 App. Div. 565; *Robertson v. De Brulatour*, 188 N. Y. 301, contain nothing to the contrary.

The first case arose under a deed of trust. There was, therefore, no need of an annual accounting and no danger that the principal might be seriously impaired by the costs of many successive accountings. The action was brought for

the final adjustment of the trust both as to income and principal and the only question litigated was whether the entire fund was large enough to justify full commissions to each trustee. The burden of the inquiry almost wholly concerned the principal fund.

In the other case, the conflict was between the life tenant and the remainderman under a testamentary trust, as to whether certain accretions of stock left by the testator belonged to the life tenant or the remainderman, and each party to the controversy prevailed in part. Both appealed and it was apparently only the costs of such appeal which the court considered. The direction that each party to the appeal should have costs thereof and that the same should be assessed upon the capital "in order that the burden might be equitably borne" affords no guide for the present purpose.

Let the expenses of making the account and the costs to be awarded be paid from the income.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of HARRY WOLFF as Executor of the Estate of WILLIAM WOLFF, Deceased.

(Surrogate's Court, Kings County, January, 1913.)

EXECUTORS AND ADMINISTRATORS—PROVISION IN WILL FOR PAYMENT OF LEGACIES—PROVISION THAT LEGACIES SHOULD BE BORNE RATABLY—TRUSTS.

Where, after a bequest of the net income of a certain trust fund directed to be invested at five per cent. per annum, to testator's daughter for life, and several general legacies, the will provided that in the event the estate should be insufficient to pay in full

the legacies the trust fund provided for the daughter was to be paid in full, and that the reduction, if any, should be borne ratably by all the legacies, it being the testator's intention that the said trust fund should remain to the daughter unimpaired, the income therefrom constitutes a legacy to the daughter as one for support and maintenance payable at testator's death.

Where, without any assigned fault of the executor, no income has been earned, the decree on the judicial settlement of his accounts should provide for the payment of said legacy from the principal of testator's general estate from the time of his death, with interest at five per cent. per annum, though the condition of the estate was such that the payment was impracticable or impossible, upon the theory that in some form the equivalent of said five per cent. on the trust fund was separated from the general assets and given to testator's daughter.

The enforcement of any complaint that the executor had improperly held the estate in a barren condition, was for the general legatees and not testator's daughter.

PROCEEDING upon the judicial settlement of the account of an executor.

L. J. Morrison, for executor.

George Wood, for objector.

Jacob Goodman, for Rachel Wolff, general guardian for Rosalind Wolff, infant.

KETCHAM, S.—The will contains a legacy of \$5,500 in trust to invest on first mortgage upon improved real estate at the rate of five per centum and to pay the net income to a daughter during her life.

There follow several general legacies, and then this provision:

"*Ninth.* In the event that the total of my estate shall be insufficient to pay in full the legacies above provided for, I

direct that the full sum of five thousand five hundred dollars hereinabove provided for my daughter, Esther Wolff, shall be paid in full, and that the reduction, if any, necessary shall be borne ratably by all the other legacies; it being my clear Will that the share of my said daughter's trust fund shall remain for her unimpaired."

The estate, except for items which were less than the debts and expenses of administration, was unproductive stock in a real estate corporation. This stock was held for two years until a fair chance arose for the sale of the corporate property and the conversion of the stock into money by the executor.

The provision for the daughter, especially in view of the solicitude of the testator that the trust for her benefit should be preferred to other legacies, must be regarded as a legacy for support and maintenance. It was, therefore, a gift to take effect at the death of the testator. Payable then, it should now be paid for the entire period elapsed since the death, less the expenses of the administration of the trust. *Matter of Kings County Trust Company*, 141 App. Div. 48.

It is not perceived that the rule in regard to this legacy can be other than that which the law would apply if the gift had been of a specific sum payable at the testator's death or of an annuity to commence at that time. The subject of the gift which was carved out of the general estate was income upon the trust fund at the rate of five per centum. "It is the income which constitutes the respondent's legacy." *Matter of Stanfield*, 135 N. Y. 292, 293.

As to legacies of this kind, interest is payable from the testator's death or, as in this case, the prescribed rate of income is to be paid from that time even though the condition of the estate was such that the payment was impracticable or impossible.

The only distinctive feature of this case is that, without

any assigned fault on the part of the executor, there has been no income earned, and the disputed legacy, if payable, must be taken from the principal of the general estate. The cases which approach most nearly to the present question have been concerned with estates in which there was some increase which could be applied to the preferred legacy and resort to the residuary principal was not required. In some of them it has been said, without argument and without any direct relation to the question involved, that if no income had accrued none could be paid. In one case, where no income had accrued and the executor had failed for two years to convert the estate for the payment of a legacy in trust, the allowance of interest was regarded as a penalty upon the executor for his default. *Matter of Travis*, 85 Hun, 420.

The only source from which the beneficiary of the trust can be awarded relief is the principal of the general estate and then only upon the theory that in some form the equivalent of five per centum per annum on \$5,500 was separated from the general assets and was given to the beneficiary. All that the general legatees took was the residue after the trust provision should be fully satisfied, and it is for them, and not the primary legatee, to enforce complaint if the executor has improperly held the estate in a barren condition. The theory above stated must prevail if, as was said in *Matter of Stanfield*, *supra*, "It is the income which constitutes the * * * legacy."

This must result notwithstanding the *obiter* suggestions that there can be no payment of income unless income has been earned.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of JOHN C. FRY as Sole Surviving Executor under the Last Will and Testament of JOHN C. FRY, Deceased.

Matter of the Judicial Settlement of the Account of the NASSAU TRUST COMPANY, of the City of Brooklyn, as Executor of the Last Will and Testament of WILLIAM H. FRY, a Deceased Executor of JOHN C. FRY, late of the County of Kings and State of New York, Deceased.

(Surrogate's Court, Kings County, January, 1913.)

ACCOUNTING—EXECUTORS AND ADMINISTRATORS—BY SURVIVING EXECUTOR—INTEREST ON BONDS.

Where, upon the judicial settlement of the account of executors, it appears that they have had the advantage of a note, taken on account of certain club bonds, which carries interest payable at intervals of six months, they will be charged with interest at the legal rate with annual rests, where, under a finding charging them with the value of the bonds, the note must be regarded as their own individually and where under the proofs neither the surviving executor nor the representative of his deceased co-executor can ask that the interest payable to their testator's beneficiaries be less than that which thus became payable to them.

Where the surviving executor, who had possession of the bonds, accounts for the interest thereon up to a certain date, and the club paid the interest on the bond issue for six years more, and thereafter, in the lifetime of the deceased executor, the bonds were sold to a reorganization committee, a charge of six years' interest is necessary, whether the executor received it, or with ordinary diligence should have received it.

The items with which the executors were found chargeable must be incorporated in a restatement of the account of the surviving executor; but in the accounting of the executor of the deceased executor the finding and the decree in these respects must be confined to such statement and direction as will present the liability of the deceased executor at his death for the sums which would have been chargeable to him had he personally accounted.

PROCEEDINGS upon the judicial settlement of the accounts of a surviving executor and also of an executor of a deceased executor.

Paul Bonyng, for John C. Fry, accountant.

Charles O. Grim, for Nassau Trust Company, accountant.

Coombs & Wilson (C. W. Wilson, Jr., of counsel), for Philip J. Fry, individually and as trustee of the estate of George W. Fry, deceased.

Hart & Tompkins (Millard F. Tompkins, of counsel), for Elizabeth F. Hurlimann, Dorothy F. Duggan and Edward H. Fry.

William Williams (John G. Jackson, of counsel), for Charles Billett, a creditor.

KETCHAM, S.—The executors must be charged with \$24,668.75, on account of the fifty-five bonds of the Turkish Bath Company, under such findings as to their dealings with the securities mentioned as will accord with the evidence.

Interest on the sum last named should be charged at the rate of six per cent. with annual rests. The case, in its general features, justifies the extreme interest penalty; but, penalty or none, the accountants have the advantage of the note taken for \$24,268.75, which carries interest payable at intervals of six months. This, though taken by the executors as such, must be regarded as their own individually, under a finding charging them with the value of the bonds, and upon the proofs neither the surviving executor nor the representative of the deceased executor can ask that the interest to be

paid to the beneficiaries be less than that which thus became payable to them.

It is not conceivable that the disposition by the executors of a portion of the estate, if unlawful, can be approved upon this accounting at the election of a portion of the persons interested. Any beneficiary may personally commute his rights in any manner agreeable to the accountants and himself, but he cannot require any adjustment of the general account which would vary from the legal effect of the evidence or the just demands of creditors or other beneficiaries.

Both executors became chargeable with six years' interest upon the club bonds. The surviving executor had possession of these bonds. He accounts for interest thereon up to July, 1902, and the club paid interest on the bond issue generally up to July 8, 1908. Thereafter, in the lifetime of the executor now deceased, the bonds were sold to a reorganization committee of the club. The charge of six years' interest is, therefore, necessary whether the executors received it or with ordinary diligence should have received it.

The items with which the executors are found chargeable must be incorporated in a re-statement of the account of the surviving executor, but in the accounting of the executor of the deceased executor the finding and decree in these respects must be confined to such statement and direction as will present the liability of the deceased executor at his death for the sums which would have been chargeable to him if he had accounted in his own person. The account of the executor of the deceased executor so far as it affects the accountant personally must be approved.

Decree should be submitted in each proceeding in accordance with these views.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of FREDERICK W. JAGEL, as Executor of JULIUS M. JAGEL, Deceased.

(Surrogate's Court, Kings County, January, 1913.)

WILLS—CONSTRUCTION—DEVOLUTION OF INTEREST—DIRECTION FOR SALE OF REAL AND PERSONAL PROPERTY.

Where a will in one paragraph directs the sale of certain real and personal property and an equal division of the proceeds of such sale among testator's children and certain of his grandchildren, and, in the next paragraph, a daughter of testator is given all his right, title and benefit in a fraternal organization, and all the beneficiaries survive testator, the gifts under the first paragraph vest at the death of testator and the interest of a grandchild upon her death passes to her legal representatives and not to her next of kin; and a decree judicially settling the account of testator's executor cannot be entered unless such legal representatives are brought into the proceeding.

PROCEEDING upon the judicial settlement of the account of an executor.

Egbert K. Van Beuren, for accounting executor.

C. H. Fuller, special guardian for **Louis N. Jagel**, **Veronica Amrhein** and **Dorothy Jagel**, infants.

Otto Scheilke, for **Julius C. Jagel**.

KETCHAM, S.—The executor accounts under a will which in part is as follows: The testator, after directing the sale of certain real estate and personal property described, directs in paragraph four that, "after the sale of said real estate and personal property, the proceeds shall be divided in equal parts

among his children" and certain grandchildren named, eleven persons in all, including a granddaughter, Marie Jagel.

He then proceeds:

"V. To my daughter, Louisa, I give in addition to her share in aforementioned property all my right, title and benefit that I am entitled to in The Masonic Mutual Benefit of New Haven, Connecticut."

All of the eleven beneficiaries under these provisions survived the testator, and Marie Jagel has since died.

In paragraph IV of the will the only words of gift are found in a direction to divide and pay at a future time. Unless, therefore, the words in that paragraph are qualified or expanded by other portions of the will the gift is future, not immediate; contingent, and not vested. *Matter of Crane*, 164 N. Y. 71, 76.

The rule, under which gifts contained in a direction to divide and pay are declared to be future and not vested, must yield readily to anything in the will which appears to indicate a contrary intention. *Roosa v. Harrington*, 171 N. Y. 341, 351, and cases cited.

Paragraph V contains a clear intimation that the gifts to each of the distributees named of a portion of the proceeds of the sale to be divided in the future are intended by the testator to vest at his death. The daughter, Louisa, named in the fifth paragraph is one of the distributees named in the paragraph for division. Her interests as to the property to be sold for the purpose of distribution are regarded and described by the testator as "her share in aforementioned property."

It is as if the testator had said, "My gift to Louisa of an interest in the proceeds of the sale of the property mentioned in paragraph III is in my sight a gift to her of a share in the property itself." Such gift must vest at death and the conception that it vests as to one whose sole right springs from a

direction to divide among many involves the intent that all the persons named as participants shall have the same vested share as to the property which is the subject of sale and division.

The decree will proceed upon the finding that Marie Jagel took a vested interest in the proceeds of the sale of the property, real and personal, which is mentioned in paragraph IV of the will and that upon her death the same interest passed, not to her next of kin, as contended, but to her legal representatives.

This decree cannot be entered unless the representative of Marie Jagel is brought into the proceeding.

Decreed accordingly.

Matter of the Will of CHARLES RAAB, Deceased.

(Surrogate's Court, New York County, January, 1913.)

WILLS—CONSTRUCTION—INTENT OF TESTATOR—PLAIN IMPORT—VOID REMAINDER.

Where the meaning of a will is apparent from its language, the plain import cannot be departed from to save the instrument from condemnation.

Where a testator's intention is clear from the face of his will no resort to extraneous circumstances is permissible in aid of the construction of the instrument.

Where a remainder contingent upon an uncertain event is limited on an invalid trust term, it is void from its creation.

A residuary bequest and devise to trustees to collect rents, issues and profits, to apply the same to the costs of the maintenance of the trust estate and to accumulate the surplus during the minority of four grandchildren of testator, with equitable cross remainders in the trust fund, in the event that any grandchild dies before

reaching majority, with legal remainders over to charity in the event that all the grandchildren die before arriving at full age, violates the statute as to perpetuities and is, therefore, void.

THE parties, in a proceeding for the probate of the last will (and a codicil thereto) of Charles Raab, deceased, expressly put in issue the validity, construction and effect of the following portions of the said will (executed within this state by a resident thereof), viz:

“*Fifth.* All the rest, residue and remainder of all my estate, both real and personal, I give, devise and bequeath to my executor and trustee hereinafter named, in trust, however, to collect the rents, issues and profits thereof during the minority of my grandchildren, hereinafter provided for; to apply the same toward the payment of all taxes, assessments and toward the repair, maintenance and improvement of said property; and the surplus thereof to accumulate the same during the minority in bonds and mortgages and other securities as may be permitted by law.

“Upon the arrival of the age of twenty-one years of any of my grandchildren, to wit, the children of my son George Thomas Raab, I direct my said trustee to pay and distribute to such grandchild his or her proportionate share of my estate and the proportionate share of all accumulations thereof, dividing my estate into as many shares as there may be children of my said son George Thomas or the representatives of any children or children of my said son living at the time the oldest living grandchild arrives at said age of twenty-one years.

“In the event of the death of any child of my son said George Thomas who shall die before arriving at said age leaving lawful issue, the share of the one so dying shall be paid to and is hereby devised and bequeathed to such issue equally. Should any child of my said son die before arriving at said

age of twenty-one years without leaving lawful issue, I then give and bequeath his or her share to the surviving sisters and brothers or the issue of any deceased brother or sister per stirpes.

"*Sixth.* In the event of the death of all my said grandchildren during minority without leaving lawful issue, I give and bequeath and I direct the payment of my estate and all accumulations thereof to the Presbyterian Hospital, St. Lukes Hospital, the Post Graduate Hospital, all of the borough of Manhattan, and to the Wartburg Home for Aged and Infirm of the borough of Brooklyn, in equal proportions."

Charles Raab, the testator, died in New York county on the 6th day of June, 1912. At the time of his death he was a resident of New York county. His will was made and executed in New York county on the 14th day of March, 1906, and the codicil thereto was made and executed in New York county on the 21st day of December, 1908. At the time of his death he possessed both real and personal property in this state. George Thomas Raab, the contestant herein, was his only heir and next of kin.

George Thomas Raab, the only son of the testator, had two children living at the time of the execution of the will, aged two years and one year, respectively. At the time of the execution of the codicil he had three children living; at the time of the testator's death the said George Thomas Raab had four children living, aged eight, seven, four and two years, respectively.

Kauthoff, Harmon & Mathewson (Edward J. Patterson, of counsel), for will and codicil and for United States Mortgage & Trust Company.

Forster, Hotaling & Klenke, for George Thomas Raab, contestant.

Taylor, Jackson & Brophy, for New York Post-Graduate Hospital and Medical School.

John C. Stemmermann, for Wartburg Home for the Aged and Infirm.

Jeremiah A. O'Leary, special guardian.

FOWLER, S.—The last will of Charles Raab being entitled to probate, irrespective of the alleged invalidity of some of its provisions (Matter of Davis, 182 N. Y. 468; Matter of Trumble, 199 id. 454), is now here for construction, pursuant to section 2624, Code of Civil Procedure. Prior to the amendment of section 2624, in the year 1910 (Laws of 1910, chap. 584), the surrogate was without jurisdiction to construe devises or other provisions relating to real property contained in a will. Matter of Trotter, 182 N. Y. 465. Since that amendment it would appear to be otherwise, and the surrogate has such jurisdiction. Bollinger v. Taylor, 144 App. Div. 851; Matter of Randall, 77 Misc. Rep. 41. Unless the amendment of 1910 had such effect, its scope and purpose is not apparent. As the surrogate's jurisdiction is not questioned in this proceeding, it will be taken for granted for the purposes of the present cause, although some points of the general legislation of 1910, touching the surrogate's jurisdiction over devises, may be, perhaps, open to serious contention ultimately in the higher courts of the state. Those points are not, however, involved here, and, consequently, need not be noticed at large by the surrogate.

Where the meaning of a will is apparent from its language, the plain import of the language cannot be departed from, even though that import result in rendering the will invalid. Van Nostrand v. Moore, 52 N. Y. 12. Courts of construc-

tion are not permitted to wrest the language of a will from its natural import in order to save it from deserved condemnation. *Cottman v. Grace*, 112 N. Y. 299. The first duty of a court of construction is to interpret the testamentary disposition which the testator intended to make, and when that is done the validity or invalidity of the disposition must be adjudged regardless of consequences. The court cannot, where there is no ambiguity or doubt, make a new will for the purpose of applying the maxim "*ut res magis valeat suam pereat.*" *Central Trust Co. v. Eggleston*, 185 N. Y. 23. It is only where there is uncertainty, doubt or equivocation on the face of a will that that established maxim of construction is to be applied.

Where the intention of testator is clear on the face of the will itself no resort to extrinsic circumstances is permissible. It is not accurate to say in such a case that the court may always consider circumstances surrounding the testator when he made his will or at the time of his death in order to arrive at his intention. *Higgins v. Dawson*, A. C. 1; *Smith v. Smith*, 1 Edw. Ch. 189. Extrinsic evidence is never permissible where the intent of the testator may be gathered from the language of the will itself. To my mind this is such a case. But it is permissible to resort to extrinsic circumstances in order to show who in fact were the objects of the testator's bounty. There is an important distinction between evidence of testator's intention deduced from circumstances surrounding testator, and the evidence of testator's bounty deduced from facts surrounding the objects of such bounty. The latter kind of evidence is, I may say, generally admissible in causes of this character.

The will in this case makes no provision for the testator's only son. It passes over him to the son's children. The grandchildren, on the face of the will, were to be the main objects of the testator's bounty. The testator, being *capax*, was quite within his rights in making such a disposition of his estate.

Jackson v. Betts, 9 Cow. 208; reversed on another point, 6 Wend. 173; *Horn v. Pullman*, 72 N. Y. 269, 276. In order to carry out the scheme of his will testator bequeathed and devised his estate to a trustee for the benefit of his grandchildren. The trust scheme is asserted to be counter to the statute now directed against perpetuities, and this is the first question in this cause. It may be observed that the statute against perpetuities is of increasing importance at this day, when the wisdom of tolerating express trusts is being more and more challenged in many states and countries. Certainly the correct application of a statute founded on public policy is most important in any case.

It does not seem possible to bring this will within the ruling of such decisions as *Warner v. Durant* (76 N. Y. 133), and *Matter of Lincoln Trust Co.* (76 Misc. Rep. 421), and treat the gift to each grandchild as severed instantly from the general estate, and to be paid to him in any event at majority, meanwhile giving him the income from the fund. This is just what the late Mr. Raab does not do. On the contrary, he provides that the trust property shall be kept by the trustee intact until the happening of an event specified.

Is the trust term prescribed too long? The will directs the trustee to collect the rents, issues and profits of the residuary estate during the minority of testator's grandchildren, who at his death were four in number, ages eight, seven, four and two years, respectively. It will be observed that there is no direction to pay any portion of such rents, issues and profits to the grandchildren during their minority, but the same are to be accumulated and invested by the trustee. Upon the arrival at the age of twenty-one years of any of said grandchildren the trustee was directed to pay and distribute to such grandchild his or her proportionate share of the residuary and its accumulations. Then follows a provision of the will providing for the

death of any grandchild before attaining the age of twenty-one years. These clauses must be read together. The real question then raised by the peculiar language of Mr. Raab's will is this: Does the trust term which he prescribes necessarily involve four actual minorities?

On the face of the will there is no direction for division or distribution of the property before the arrival at the age of twenty-one of "the oldest living grandchild." Nor is there any direction to limit the division to the number of grandchildren who were living at the death of the testator and who would be living at the time of the division or would have died before that time leaving issue. On the contrary, there is an express direction to divide the property into as many shares as there may be children or representatives of children of his son, George Thomas Raab, living at the time of division. At what time or upon the occurrence of what event did the testator intend that such division should be made? Was it when the eldest grandchild living at the time of his death should arrive at the age of twenty-one or died before reaching that age, or was it when the eldest grandchild who survived should reach the age of twenty-one? If it be assumed *in arguendo* that testator intended the division of the trust estate to be made when the eldest grandchild living at the time of his death reached the age of twenty-one or died before that time, this will be contradictory of the direction contained in the first part of the paragraph to distribute and pay "upon the arrival at the age of twenty-one years of any of my grandchildren." If, however, the testator is taken to mean by the words "at the time the oldest living grandchild arrives at the age of twenty-one years," the eldest of his grandchildren who survived until he reached the age of twenty-one years the different phrases of the paragraph harmonize and express a definite conception, namely, that the trust was to continue until the eldest grandchild who survived

until he was twenty-one should reach that age. "The arrival of the age of twenty-one years of any of my grandchildren" necessarily means the first of his grandchildren who arrived at that age, or the eldest living grandson who survived to that age, and is entirely inconsistent with an interpretation which would ascribe to the testator an intention that the division should be made when the eldest grandson living at the time of his death arrived at the age of twenty-one or died before reaching that age. It would therefore appear that it was the intention of the testator to create a trust; that the trustee was to accumulate the rents and profits of the trust fund until the eldest living grandchild who survived until he was twenty-one reached that age, when the corpus of the trust was to be divided into as many shares as there were living grandchildren or issue of deceased grandchildren; that the share of the one who had reached twenty-one was to be paid to him at that time, and the share of any one who had died leaving issue was to be paid to such issue; that the remainder of the trust property was to be held by the trustee and the rents and profits accumulated until the next grandchild reached twenty-one or died before that time leaving issue, when the share of such grandchild would be paid to him or his issue, and that such accumulations and payments were to continue until all the grandchildren living at the time of the division reached twenty-one or died before reaching that age, and if all the grandchildren died before reaching twenty-one without leaving issue the corpus of the trust fund, with the accumulations, was to be paid to the corporations mentioned in the sixth clause of the will. Such, I think, is the apparent intent of the testator in regard to the duration of the trust term. No other interpretation seems possible under settled canons of interpretation.

According to my interpretation of this will, already indicated, the provisions of the fifth and sixth clauses of the will

must be adjudged invalid. These clauses create a trust which suspends the power of alienation of real property for more than two lives in being and a possible minority, and which suspends the absolute ownership of personal property for more than two lives in being at the time of the creation of the estate. Real Prop. Law, § 42; Pers. Prop. Law, § 11; *Jennings v. Jennings*, 7 N. Y. 547; *Schettler v. Smith*, 41 id. 328; *Benedict v. Webb*, 98 id. 460; *Greenland v. Waddell*, 116 id. 234; *Schlereth v. Schlereth*, 173 id. 444; *Central Trust Co. v. Eggleston*, 185 id. 23; *Leach v. Godwin*, 198 id. 35. The direction for accumulations are by the adjudications of this state also invalid (Real Prop. Law, § 61; Pers. Prop. Law, § 16), as I shall hereafter show.

If, however, the provisions of this will were ambiguous and equally susceptible of some other interpretation which makes the limitation in trust valid it would be the surrogate's duty to adopt such interpretation. *Jacoby v. Jacoby*, 188 N. Y. 124. But in arriving at such an interpretation the court cannot make a new will for the testator nor sanction a plain attempt on the part of a testator to make a testamentary disposition of property in a manner prohibited by statute. Let us, then, consider in detail the contentions of counsel that no perpetuity exists in this will.

It is contended by the learned counsel for the proponent that at the death of the testator each of the grandchildren then living took a vested interest in one-fourth of the corpus of the trust. As the only words of gift used by the testator were a direction to divide or pay at a future time the gift is not vested, but future and contingent. *Salter v. Drowne*, 205 N. Y. 215; *Matter of Crane*, 164 id. 171; *McGillis v. McGillis*, 154 id. 532. It is also contended that the testator intended to limit the beneficiaries of the trust fund to the grandchildren who were living at the time of his death. The testator having

created a trust and directed that it should be held *in solido*, no division or distribution to be made until a grandchild arrived at the age of twenty-one, when the trust fund was to be divided into as many shares as there were grandchildren then living, the issue of any deceased grandchild to take its parent's share, the bequest was to a class, and the children born to George Thomas Raab after the testator's death would be entitled to share in the estate if they were living when the time for division arrived. *Matter of King*, 200 N. Y. 189; *Matter of Baer*, 147 id. 348; *Matter of Crane*, 164 id. 71.

The special guardian for the infants contends that the trust was only for the benefit of those grandchildren who survived the testator; that the latter intended that the trust should continue during the minority of the eldest grandchild living at his death, and that it should terminate upon the arrival of such grandchild at the age of twenty-one years, or by his death before reaching that age; and that at the time when the first of these events occurred the trust estate was to be divided into as many shares as there were grandchildren then living who survived the testator and the issue of any such deceased grandchildren. The objection to this contention is that it requires for its support two assumptions not warranted either by authority or by the language of the testator: *First*, that the testator intended the division to take place when the eldest grandchild living at his death reached twenty-one, or died before reaching that age; and *second*, that the testator intended to limit his bounty to such of his grandchildren as were living at the time of his death. Remembering that at the time the testator made his will his son, George Thomas Raab, had only two children, and that at the time of testator's death his son had four children, the youngest of whom was only two years of age, it would seem as entirely unjustifiable assumption that the testator intended to exclude from participation in his estate those grandchildren who might

be born after his death, while evidencing such a keen desire to provide for the maintenance of those who were living at the time of his decease. According to the special guardian's interpretation, if the eldest grandchild living at the time of testator's death died one day thereafter, the corpus of the trust fund would vest in the grandchildren then living to the exclusion of any after born grandchildren. But the words of the testator directing the trust to continue "during the minority of my grandchildren," directing payment "upon the arrival of the age of twenty-one years of *any* of my grandchildren," and directing a division of the trust estate "into as many shares as may be children of my son George living when the oldest living grandchild arrives at the age of twenty-one," are so clear and comprehensive and so evidently meant to apply to any children of his son George who would be living at the time when the eldest grandchild arrived at the age of twenty-one, that their signification cannot be limited by any mere assumption which would impute to the testator an intention to exclude from participation in his estate those grandchildren who might be born after his death. The plain language of the testator negatives the first assumption. The cases above cited show that authority is against the second.

If we assume, for the sake of argument, that the testator intended that the division of the property held in trust should be made when the eldest grandchild living at the time of his death reached his majority or died before that time, we get the following result: If such grandchild died before arriving at the age of twenty-one without leaving issue, and if the other grandchildren who survived the testator were then living, the trustee could divide the trust fund into four shares and pay the one-fourth of the one who had died to the survivors as their absolute property. If the second eldest died before his majority without leaving issue, his share of the trust property would

be paid to the survivors. Upon the death of the third grandchild before arriving at the age of twenty-one without leaving issue, his share would be paid by the trustee of the surviving grandchild; and, if the latter died before twenty-one without issue, his share, i. e., the remaining one-fourth of the trust estate, would be paid by the trustee to the corporations mentioned in the sixth clause of the will. The four grandchildren would then have died during minority without leaving issue, which is the contingency mentioned by the testator in the sixth clause of his will upon which the corporation therein mentioned became entitled to "my estate and all accumulations thereof." But according to this interpretation, not his estate, but only one-fourth of his estate would then be available for payment to the corporations. Therefore it appears conclusively that the interpretation contended for by the special guardian and the counsel for the proponents does not accord with the manifest intention of the testator.

The learned counsel for the proponents, as well as the special guardian for the infants, cite *Matter of Lally*, 136 App. Div. 781, in support of their position. But *Matter of Lally* is readily distinguishable from the matter under consideration. In that case the testator gave his property to trustees, with directions to hold and manage it for the support and education of his children during their minority and when the youngest of such children had arrived at the age of twenty-one to divide and distribute the property and accumulated income between such children, share and share alike. There was no gift over or substituted remainder. The court held that it was the intention of the testator that the trust should terminate upon the majority of his youngest daughter who survived him, or upon her death before reaching her majority, and that upon her reaching the age of twenty-one or dying before that time the trust terminated and the duty of the trustees was to divide and dis-

tribute. In the matter now before me, even under their interpretation of the will, the trust does not terminate upon the arrival of the eldest living grandchild at the age of twenty-one years or his death before that time; it continues as to part of the trust property until the youngest living grandchild who reaches the age of twenty-one has arrived at that age. Therefore the trust is not, as in *Matter of Lally*, to terminate when a certain child shall reach its majority or die before that time. Besides, in the matter now here the will provides for gifts over and substituted remainders, and a final contingent remainder to corporations in the event that all the grandchildren die before the age of twenty-one without leaving issue. So that, as the court said in *Whitefield v. Crissman*, 123 App. Div. 233, "there is no method by which the trustees could distribute the property bequeathed to them until the termination of the minority of the four children, nor could there be any alienation of the real property and distribution of the proceeds during a like period." It is true that, under the interpretation contended for by the proponents, there could be a distribution of a part of the trust property, but there could not be a distribution of all the property until the youngest surviving grandchild reached his majority or died before that time.

The proponents rely upon the case of *Seitz v. Faversham*, 205 N. Y. 197. In that case the testatrix gave her real and personal property to the issue of her daughter, the rents and profits to be paid to them until they arrived at the age of twenty-one. At the time of testatrix's death her daughter had two children. The court held that a future contingent estate vested in the two infants upon the death of the testatrix, subject to divestment as to either one who should die before he became of age. In the event of such divestment the estate vested absolutely in the survivor, so that the trust was measured by two lives. In the matter under consideration there were four

grandchildren living at the death of the testator, so that the period of suspension of alienation may not be measured by two lives as in the *Seitz v. Faversham* case, but by four lives. The surrogate has now considered all the contentions and arguments of counsel in support of the will, and for the reasons stated he must adhere to the conclusion already reached to the contrary.

The direction for accumulation is void, because upon any interpretation of the provisions of the will these accumulations would inure to the benefit of minors not in being at the time the accumulation commenced, namely, at the death of the testator. Thus if testator intended that the grandchildren born after his death should participate in his estate the direction for accumulation would be invalid. If he intended to limit the beneficiaries to those living at the time of his death and who arrived at the age of twenty-one, or died before the time of division leaving issue, as such issue would be entitled to their parents' share of the accumulation, and as they were not in being when the accumulation commenced, the direction for such accumulation would be invalid. *Real Prop. Law, § 61; Pers. Prop. Law, § 16; United States Trust Co. v. Soher, 178 N. Y. 442.* But the invalidity of the direction for accumulation would not of itself render the trust invalid. *Cochrane v. Schell, 140 N. Y. 516.* In view of the disposition which I intend to make of this matter it is not necessary to decide who would be entitled to the accumulation if the trust were valid.

In *Jennings v. Jennings, 7 N. Y. 547*, the testator directed that his executor should pay to his wife from the income of his estate sufficient for her support and the support and maintenance of his children, and that they should accumulate the remainder of the income until the eldest surviving child reached the age of twenty-one, when such child's portion was to be

paid to him, and that the same course should be pursued with respect to his other children. The testator was survived by four children. The court held that the trust was void as suspending the power of alienation for more than two lives in being. In *Benedict v. Webb*, 98 N. Y. 460, the period of division was designated by the testator as follows: "When all my said children, or the youngest survivor of them, shall have attained the age of twenty-one years." The court held that it was the intention of the testator to suspend the division until all his minor children living at his death should attain their majority. There were two minor children living at his death. The trust was continued in part for the benefit of two daughters during their lives. The court held that the trust was bad as to that part which was continued after the period of minority of the two minors. In *Greenland v. Waddell*, 116 N. Y. 234, the testator provided that one-third of his property should be held in trust, the income to be paid to his sister during her life, and upon her death the income to be paid to her children "until the youngest child shall arrive at the age of twenty-one years, and, on said youngest child arriving at such age, my said executors shall pay and transfer to the child or children that shall then be living the whole of said one-third, with its accumulations, and on the death of all of said children, before arriving at such age * * * my executors shall pay the remaining one-third to my brother and sister." The court said: "If the children do not reach the age of twenty-one, the fact that the direction is that the fund shall go to a brother and sister of testator is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is therefore clear that the direction in the will will operate to suspend the absolute ownership of the fund."

In *Bindrim v. Ullrich*, 64 App. Div. 444, testator gave his

property to trustees, with directions to pay the income to his widow for life. At the death of the widow to "pay the income and profits from one share thereof to Eva B. * * * during the minority of my grandchildren, the children of my son Julius, to be used by him for the support, maintenance and education of said grandchildren, and when they attain the age of twenty-one years to divide such share among such grandchildren equally, share and share alike." Held invalid as suspending the absolute ownership of property for the life of the widow and five grandchildren. Also because there was a possibility of a grandchild being born after the creation of the estate, and the power of alienation according to the terms of the will would be suspended until all the members of the class arrived at the age of twenty-one. In *Whitefield v. Crissman*, 123 App. Div. 233, the testator gave property to trustees for the benefit of his four children, "the income and such portion of the principal as may be necessary for their maintenance to be used until all shall have reached their majority, when * * * the residue or balance is to be divided share and share alike among them, * * * in the event of the death of any of said children without issue, said share to be divided *pro rata* among those remaining." Held that the trust violated the statute. In *Schlereth v. Schlereth*, 173 N. Y. 444, the testator left real and personal property with a power of sale. He directed that the income should be paid to his sister during her life. After her death to pay over such income to her issue in equal shares until the youngest of such issue attain the age of twenty-one, and then to divide and distribute the whole of the trust fund so held among such issue in equal shares. The court said: "It is obvious from the provision to pay over the principal when the issue reached the age of twenty-one, paying to them the income in the meantime, that the testator intended to make a future and not a present gift.

It is also obvious that the income and corpus of the estate was intended by the testator to be divided among the persons answering the description contained in the seventh clause of the will at the time when such division was to be made. Thus the time during which the absolute ownership was to be suspended was not measured by two lives in being at the death of the testator." The trust was held invalid. These cases cited are analogous in principle to the matter under consideration. It therefore follows that the trust attempted to be created by the fifth clause of the testator's will is invalid.

The sixth clause provides that in the event of the death of all the children of George T. Raab before arriving at the age of twenty-one without leaving issue, the whole estate with the accumulated rents and profits shall be paid to the corporations therein mentioned. As to the accumulated rents and profits the bequest is void, because profits cannot be accumulated for the benefit of adults. Before the trustee could pay the trust estate or any part of it to those corporations it would be necessary for him to hold the property in trust during at least four lives, because it is only upon the death of the last survivor of the grandchildren without leaving issue that the corporation would be entitled to take. A remainder contingent because of an uncertain event, which cannot vest in possession until after the termination of more than four lives in being at the time of the creation of the estate upon which it is limited, is invalid. Besides, a contingent remainder limited upon an invalid trust term is invalid. *Knox v. Jones*, 47 N. Y. 389; *Bindrem v. Ullrich*, 64 App. Div. 499; *Greenland v. Waddell*, 116 N. Y. 234.

As the fifth and sixth clauses of the will are invalid the testator died intestate as to the property which he attempted to dispose of by those clauses, and such property passed to his heirs at law and next of kin. Let the decree be settled accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account and Supplemental Accounts of HARRY B. HOLLINS, JOHN L. CADWALADER and FREDERICK OGDEN BEACH, as Executors of the Last will and Testament of CONSUELO, DOWAGER DUCHESS OF MANCHESTER, Deceased.

Surrogate's Court, New York County, January, 1913.)

TAXES—TRANSFER TAX—ANNUITIES—WILL OF FOREIGN SUBJECT—EXECUTORS AND ADMINISTRATORS.

Where an annuity, given by the will of a British subject to an Austrian subject, though payable from assets in the United States of America, is subject to a legacy tax in England, the remittance by the American representative of the estate to the English executors of the amount of such tax, and the deducting of the same from the property set apart by the executors in America for the production of such annuity, are justified, and an objection to such payment will be overruled.

This matter came on for hearing before the surrogate on certain objections to the supplemental accounts taken by the Countess Zichy and on the settlement of the proposed decree. In aid of the various contentions the following facts were stipulated and submitted to the surrogate on the hearing, viz:

1. Consuelo, Dowager Duchess of Manchester, the testatrix herein, died on the 20th day of November, 1909, a permanent resident of and domiciled in the city of London, Eng., and at the time of her death was a citizen of the kingdom of Great Britain and Ireland. The said testatrix left a last will and testament bearing date the 7th day of January, 1909, and a codicil thereto bearing date October 28, 1909, which were duly executed in conformity with the laws of the place of her domicile and in accordance with the laws of the state of New York and true copies of which will and codicil are hereto annexed. The said last will and testament and codicil were duly admitted

to probate in the Principal Probate Registry of the High Court of Justice in England on the 17th day of December, 1909, and by original proceedings were duly admitted to probate by one of the surrogates of the county of New York on the 8th day of June, 1910. Letters testamentary were duly granted by this court to John L. Caldwell, Harry B. Hollins and Frederick Ogden Beach, the accounting executors herein.

2. The said testatrix at the time of her death had property of large amount located in the state of New York and elsewhere in the United States, which consists entirely of personalty. She also left real estate in Cuba. All such property is directed by the will to be administered by the American executors. Certain legacies and annuities, including that to the Countess Zichy, are directed to be paid out of said American assets, and the residuary American estate is to be held in trust by the said executors, as trustees under the said will, and the said property is not to be remitted to England or subject to administration therein.

3. A suit was brought in the High Court of Justice in England, Chancery Division, by the executors appointed in England, viz, Vere Brabazon, Viscount Duncannon and Thomas Rawle, against the present Duke of Manchester, the Duchess of Manchester and their children and the American executors who are accounting herein. The proceedings were subsequently discontinued against the said American executors, who had not been served with process or appeared therein. Mabel Countess Zichy, was not a party to the said suit. An order was made in such suit on the 20th day of February, 1912, a true copy of which is hereto annexed. Thereafter, in the execution of the said order and judgment, it was directed by the master to whom the matter was referred, on a summons issued by the plaintiffs' solicitors, that the plaintiffs might be directed

to sell the family residence at number 5 Grosvenor square, London, and the contents, to satisfy a deficit in death duties unless the American executors should remit the sum of £20,000. A copy of the said summons, with the directions indorsed thereon which were made with respect to the relief therein sought, is hereto annexed.

4. The assets and securities committed to the administration of the executors in England, other than a leasehold in the Grosvenor square residence and the contents thereof, and heirlooms, pictures, works of art and jewelry, were insufficient to pay the entire amount of the death duties due in England with respect to the estate of the testatrix, and the deficit amounted to approximately the sum of £20,000. The premises in Grosvenor square, consisting of a leasehold as aforesaid and the contents thereof, were part of the residuary estate directed to be held upon a trust by the English executors in their capacity as trustees. The remaining property, which had been subject to the control of the executors in England, consisted of jewelry and articles of personal use, pictures, silverware, etc., which were specifically bequeathed by the said will.

5. Mabel, Countess Zichy, who under the will is entitled to an annuity of £800 given by article 12 of the said will, had been the wife of Fernando Yznaga, brother of the testatrix, an American citizen residing in the state of New York, and afterwards by marriage with Count Zichy she became a subject of the Austro-Hungarian Empire. Her personal domicile is Budapesth, in Hungary, but from time to time she has lived for short periods in England, but is not living there now. Messrs. Langham & Swift, solicitors, whose place of business is at Eastbourne, Eng., have acted for her from time to time in matters relating to the said annuity to Countess Zichy, and certain installments of said annuity have been paid to her through aid solicitors. Such solicitors have been requested by

a letter from the solicitors for the English executors, Messrs. Rawle, Johnstone & Co. to appear in the proceedings for the assessment of the legacy duty on the annuity, and a copy of such letter is hereto annexed. In reply to this letter the said solicitors wrote letters to Rawle, Johnstone & Co., and they also wrote letters to the attorneys for the American executors, contesting the right to use any of the annuity of Countess Zichy to pay the English duty. Such solicitors, Messrs. Langham & Swift, refused to appear or participate in any form in the assessment of the legacy duty or in the suit brought to determine out of what property it should be payable.

6. As an inducement to the American executors to pay the annuity free of the deduction for English death duties or legacy taxes the Countess Zichy delivered to such American executors her bond of indemnity, a copy of which is hereto annexed. Acting on the faith of such obligation the American executors have thus far paid to the Countess Zichy the said annuity free of deduction for such taxes, but the New York state transfer tax on such proportion of the securities subject to such tax in the state of New York as under the law were deemed to pass to or for the benefit of the annuitant, Countess Zichy, is being charged against said annuity in annual installments.

7. On June 7, 1912, the American executors remitted to the English executors the equivalent of £20,000 in order that the deficit in such death duties might be provided for without sale of the heirlooms personal effects or the family residence in Grosvenor square or its contents, as aforesaid. Thereupon and by order dated June 18, 1912, of the court, in the suit referred to in paragraph 3 of this stipulation, a copy of which order is hereto annexed, the sale of the said residence and stables used therewith was stayed.

8. Any of the parties may refer to acts of parliament of Great Britain applicable to England and decisions of the Eng-

lish courts which may be published in the regular law publications.

Subject to objection on the part of the Countess Zichy that the facts are irrelevant and immaterial, it is stipulated that in the suit referred to in paragraph 3 of this stipulation there were hearings before Mr. Justice Swinfen Eady on February 12, 1912, and February 20, 1912, true copies of the reports of which are hereto annexed. (Here follows *in extenso* a report of the proceedings in the English court.)

Strong & Cadwalader (Henry W. Taft and Francis Smyth, of counsel), for the American executors.

Edmund L. Baylies and Edwin De T. Bechtel, for Countess Zichy.

Ruch Taggart, for Duke and Duchess of Manchester.

Russell S. Wolfe, for H. B. Collins et al., as trustees.

Laurence Millet, for Elizabeth Reynolds.

Egerton L. Winthrop, Jr., special guardian, for Lord Manchester et al.

A. Perry Osborn, special guardian, for Ernesto Yznaga, et. al.

FOWLER, S.—The Dowager Duchess of Manchester at the time of her death was a British subject, domiciled in England, where her last will and a codicil thereto were duly probated on the 17th of December 1909. Subsequently the same testamentary instruments were proved *de novo* in this jurisdiction before a surrogate for this county, and letters testamentary were

thereupon granted by this court to the gentlemen called the "American executors" of the late Dowager Duchess of Manchester. It appears that the testamentary instruments aforesaid designate executors for the English estate, and separate executors, domiciled here, for the American estates. It is the accounts of the "American executors," so called, which are now filed for settlement in this court. The Countess Zichy, a legatee under the will, objects to that part of the proposed decree which in substance provides that the American executors and trustees shall deduct from the annuity coming to her under the said will a certain amount in satisfaction of the legacy duty payable thereon under the laws of England to the Crown. A sum sufficient to pay such legacy duty has been remitted by the American executors to the English executors. The Countess Zichy is now nationally an Austrian subject, domiciled in Austria, and in her behalf it is claimed in substance that the American executors should have ignored the laws of England and are bound to pay over to the Countess Zichy, free of the English duty or tax, the annuity given to her by the will of the late Dowager Duchess of Manchester. The only question before the surrogate is whether or not the American executors were justified for the purpose of this accounting in remitting to the English executors a sum sufficient to discharge the legacy duty imposed by the laws of England on the annuity to the Countess Zichy.

As the Dowager Duchess of Manchester had become an English woman and was domiciled in England at the time of her death, the devolution and disposition of her movable estate, or, in other words, her personal property, are primarily governed by the law of her English domicile. *Parsons v. Lyman*, 20 N. Y. 103. The law of England provides for a legacy duty upon every bequest of personal property contained in the will of the late Dowager Duchess. The annuity to the Countess

Zichy was clearly, in the abstract, subject to the payment of such legacy duty. As our own Tax Law imposes a similar succession tax or duty upon the personal property of a resident of this state, wherever such property may be situated (*Matter of Estate of Swift*, 137 N. Y. 77), we ought not in this matter to question the right of a foreign state to impose a succession tax upon personal property, wherever situated, belonging to its subject domiciled in such foreign state.

Although the will of the late Dowager Duchess of Manchester was proved here *de novo*, nevertheless England is in this instance, the principal place of administration. The administration here, whether so termed or not, is to some extent necessarily an acillary administration only. There cannot be two principal places of administration in respect of the estate of this deceased English lady. *Despard v. Churchill*, 53 N. Y. 192; *Matter of Hughes*, 95 N. Y. 55. The possession of the American executors is to be regarded in this instance, there being no claims of American creditors interposed, to some proper extent, as a possession of an English estate. The mere fact that the Dowager Duchess named executors domiciled in the various countries where her estate or her securities were situated does not make her foreign executors any the less her executors. If not strictly her executors, they are, in any event what in some systems is termed her, "Posthumous agents." For some purposes executors and a testator are *eodem persona* in legal contemplation. Otherwise such executors are "posthumous agents," and where no local impediment exists their obligations are not different from the paramount and legal obligations of the deceased whom they represent. It may be assumed, I think, that the Dowager Duchess of Manchester contemplated that her posthumous agents or executors, wherever they might be, would in respect of her estate comply with the law of her domicile in so far as

possible, unless the *lex fori* prohibits such compliance. This it does not, in this instance, do, as there is no pretense that her estate is not entirely solvent. It does seem to me, there having been no local interposition, that the American executors of the late Duchess did precisely what they should have done when they remitted, *ex debito justitiæ*, the money to discharge the duties due by her estate to the government of England, that being the government to which their testatrix owed her primary allegiance in later life and at the time of her death. I should be sorry to think that this was not our law on this matter. I believe that the spirit of the adjudications already cited by me, if largely interpreted, bears me out in this conclusion. But there are other considerations to which I shall proceed.

It is generally true that the courts of this state will not go out of their way to aid a foreign state in the enforcement of its peculiar revenue laws. It is contended on behalf of the Countess Zichy that while England may impose a tax upon her annuity or legacy the English authorities cannot collect it, as the property out of which the annuity is payable is not actually in England and the Countess herself is not within English jurisdiction. Apparently Countess Zichy would like to have her annuity regarded here as one given by an American lady to another American lady out of American property. But both ladies have long ceased to be Americans, and by figure of speech only is the property here American. The contention of Countess Zichy is only literally true in any aspect. When the Countess Zichy became the recipient of a legacy given by the will of an English woman and payable out of an English estate, wherever situated, the legacy itself, to my mind, was burdened with certain implied conditions which bind the legatee whether in or out of English jurisdiction. In other words, the legatee must be taken to receive such

legacy subject to any burdens which the sovereign of the donor lawfully imposes on the gifts of its subjects. This fact the American testamentary executors of the Dowager Duchess have a right to recognize provided the claims of local creditors are not paramount. This is not pretended to be the case here. When the aid of this court is invoked by foreigners, as is virtually the case here (the local executors having no independent legal existence apart from their testatrix), the court should not be expected to ignore plain principles of justice. The entire content of private international law depends on natural justice and equity.

It is strenuously contended in behalf of the Countess Zichy that a legacy duty under the English law is payable only out of the particular legacy on which it is imposed, and that the English executors are liable for payment of the duty on her legacy only in the event that property shall come into their hands applicable to the discharge or payment of the particular legacy to the Countess Zichy. As the property on which the annuity to the Countess Zichy is charged, or out of which it is payable, has not come directly into the hands or possession of the English executors, and will not in the course of the administration of the estate of the late Dowager Duchess be received by the English executors, it is contended that the duty on the legacy to Countess Zichy, although payable under English law, should not be deducted by the American executors or by them paid or transmitted to the English executors of the late Dowager Duchess. I do not quite see how the American executors can be expected to ignore the state of the law of the country of their testatrix, unless compelled so to do by the *lex fori*.

From the papers submitted to the surrogate on the hearing, it would appear that Mr. Justice Swenfin Eady, a judge of the English "High Court of Justice," has decided, or authorita-

tively intimated in substance, that any property sent by the American executors or trustees to Great Britain for any purpose, may be intercepted and appropriated by the Crown in satisfaction of any unpaid legacy duty on legacies given by the late Dowager Duchess to her foreign legatees. It is not for this court to reconcile the decision of this English judge with the decisions cited by the learned counsel for the Countess Zichy. It is sufficient here that the decision in question was rendered by a foreign court of competent jurisdiction. The decision or intimation should be recognized by the surrogate in his consideration of the duty and liability of the American executors of the late Dowager Duchess. As the English courts will, I have no doubt, enforce payment of the legacy duty upon the legacy to the Countess Zichy from any property of the estate of the late Duchess located in England or forwarded to England by the American executors or trustees for the purpose of being applied to the payment of other legacies, the other legatees will in that event be compelled to pay the duty properly payable by the Countess Zichy, but unenforcible against her because of a lack of jurisdiction over her by the English court. This would result in an injustice which the courts of this country should not sanction. While it is doubtless true that this court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws. The court should favor such an administration of the estate here as will be in conformity with the intention of the testatrix. It certainly was not the intention of the late Duchess that the bequests made by her to the English legatees should be partly confiscated in the payment of death duties imposed upon the bequests to foreign legatees. The orderly and

equitable administration of the estate seems in this instance to require that the legacy duty imposed by English law upon the annuity given to the Countess Zichy by the will of the late Dowager Duchess of Manchester should be paid out of the property set apart by the executors in this country for the production of such annuity.

The objection should be overruled and the decree submitted by the accountants signed.

Decreed accordingly.

Matter of the Application of FREDERICK RICCARDO to Have Letters of Administration on the Estate of PIETRO RICCARDO, Deceased, Issue to GERMANO P. BACCELLI, Revoked.

(Surrogate's Court, Herkimer County, February, 1913.)

EXECUTORS AND ADMINISTRATORS—PRIOR RIGHT OF ITALIAN CONSUL TO ADMINISTER ESTATE OF DECEDENT—BOND MUST BE GIVEN BY CONSUL.

Where an Italian subject died in this state in 1912, leaving him surviving only his father and mother, both residents of Italy, the Italian consul under the provision of the treaty between the United States and Italy has a prior right to administer the estate of decedent.

There being no personal estate other than a claim for causing the wrongful death of decedent, the said consul must give a bond in the sum of \$500, there being a claim against the estate of \$206.40.

APPLICATION for the revocation of letters of administration.

Timothy Curtin, for petitioner.

Countryman, Nellis, DuBois & McDermott, for Italian Consul, opposed.

BELL, S.—Pietro Riccardo, a subject of the kingdom of Italy, died intestate on September 29, 1912, in Herkimer county, N. Y., where he resided, leaving him surviving his father, Guiseppe Riccardo, his sole heir at law and next of kin and his mother, both residing in Italy.

He also left said Frederick Riccardo, an uncle and a creditor of deceased, residing in the state of New York.

Letters of administration were granted by the surrogate of Herkimer county on October 31, 1912, to Germano P. Baccelli, consul of the kingdom and government of Italy for that portion of the state of New York which includes the county of Herkimer, without citation having been served on said Frederick Riccardo, or any other person and without giving a bond.

Frederick Riccardo claims that he is entitled to letters of administration upon the estate of said deceased and that the letters heretofore granted to said Germano P. Baccelli, the Italian consul, should be revoked.

The petitioner, who is a creditor of decedent, is entitled to letters of administration on the estate of the decedent, unless the Italian consul has a prior right, under the provisions of the treaty between the United States and Italy.

"All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U. S. Const., art. VI, § 2.

Every treaty made by the authority of the United States is superior to the Constitution and laws of any individual state and if the Constitution or law of a state is contrary to a treaty, it must give way to the treaty. *Hauenstein v. Lynham*, 100 U. S. 483.

The treaty of May 8, 1878, between the United States and Italy (20 Stat. 725), articles 16 and 17, provides:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that the information may be at once transmitted to the parties interested.

"Article XVII. The respective Consuls General, Consuls, Vice-Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

The convention between the United States and Sweden proclaimed March 20, 1911, provided:

"Article XIV. In the event of any citizen of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul or vice-consul, shall, so far as the laws of each country will permit, and pending the appointment of an administrator and until Letters of Administration have been granted, take charge of the property left by the deceased, for the benefit of his lawful heirs, and creditors, and, moreover, have the right to be appointed as Administrator of such estate."

In *Rocca v. Thompson*, 223, U. S. 317, the court, in construing the provisions of the Argentine treaty in connection with the Italian treaty in reference to administration to an Italian consul, said: "Had it been the intention to commit the administration of estates of citizens of one country, dying

in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.

"For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in article 33, as follows: "Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated that, in the absence of the legal heirs or representatives, the consuls or vice consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district." And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided," quoting as above stated.

I am of the opinion and conclude that under the "most favored nation" clause of the Italian treaty and that part of the treaty between the United States and Sweden which provides, "and moreover, have the right to be appointed as administrator of such estate" and the decisions (Matter of Baglieri's Estate, 137 N. Y. Supp. 175; Matter of Jarema's Estate, 137 id. 176; Matter of Lombardi, 78 Misc. Rep. 689. Matter of Gurrieri Orphans Court, Essex Co., N. J., opinion filed June 20, 1912) the Italian consul has the prior right to administer on this estate.

An order will be signed denying the prayer of the petitioner herein.

There being no personal estate but a claim for the death of decedent, and the petitioner having a claim for \$206.40, said Germano P. Baccelli should file a bond in the sum of \$500.

Decreed accordingly.

**Matter of the Appraisal of the Estate of HORACE GRANFIELD,
Deceased, under the Acts in relation to the Taxable Trans-
fers of Property.**

(Surrogate's Court, Westchester County, February, 1913.)

**TAXES—TRANSFER TAX—EXECUTORS AND ADMINISTRATORS—RATE OF TAX-
ATION TO BE DETERMINED AS STATUTE PROVIDES.**

Where an appraiser in fixing the amount of the transfer tax has only deducted the amount actually expended in the administration of assets in another state, his decree will be modified by also deducting the expense of such administration as estimated by the surrogate for future services on the judicial settlement of the accounts of the executrix.

Where testator gave to his daughter for life one-half of his residuary estate with full power to dispose of the same, and at her death her share, or so much thereof as should then remain, was given to her surviving issue, if any, in equal shares, and, in the event that she left no issue, said estate was given to testator's brother and sisters in equal shares, the remainder interest is not subject to a transfer tax until the death of testator's daughter, the rate of taxation to be determined as the statute provided at the time of testator's death.

APPEAL by Olive L. Granfield, individually and as executrix of the last will and testament of Horace Granfield, deceased, from the assessment made and filed herein and also from the order and decree of the surrogate of the county of Westchester confirming the appraisal and fixing a transfer tax upon the property bequeathed and devised by the testator.

Johnson & Mills, for appellant.

John J. Sinnott, for comptroller.

SAWYER, S.—There are two questions raised by this ap-

peal. *First*, the appellant claims that an error was made in allowing to be deducted as expenses of administration in Colorado only the sum of \$2,815.31, instead of allowing the full amount asked for of \$5,000. *Second*, that an error was made in the assessment of the remainder interest in the one-half of the residuary estate devised and bequeathed under subdivision 2 of paragraph 2 of the will of the decedent at the rate of five per cent. the appellant claiming that the remainder interest should not have been taxed at all until the death of the life tenant, or even if it were taxed that the remainder interest should only be taxed at the rate of one or two per cent.

As to the first question: It is apparent that the appraiser has allowed all the amount actually expended for administration expenses in the state of Colorado, namely, the sum of \$2,815.31. In deciding this question it will be necessary to take into consideration the fact that former Surrogate Millard, on December 27, 1912, signed a decree discharging the executrix from all further responsibility, etc., in the estate of Horace Granfield, deceased.

Section 3 of the accounting upon which the final decree was based sets forth the following: "No personal property not mentioned in said Inventory has come into my possession or to my knowledge, except I have ascertained that the said decedent had a cash deposit of \$3,866.75 with his attorney, Horace N. Hawkins, of Denver, Colorado, to cover possible expenses in litigation, in which Mr. Hawkins was representing him. The said Horace N. Hawkins has also represented me in certain proceedings and has rendered to me a receipted bill for services and disbursements rendered by him to the decedent and to me as Executrix aggregating \$2,049.16. There remain certain matters to be attended to in relation to the estate in Colorado, including the assessment and payment of the inheritance tax,

which will consume the balance of said amount which I have left with Mr. Hawkins."

It is evident that Judge Millard, in signing the decree, considered the fact that \$3,866.75 had been deposited with the attorney, Horace N. Hawkins, of Denver, Colo., to cover possible expenses in litigation, and that he assumed that the charges for the same were reasonable. The amount which was actually paid to said Horace N. Hawkins was \$2,049.16. This amount was allowed by the transfer tax appraiser, plus \$766.15 to the public administrator of Colorado, agreeable to the provisions of schedule C of the accounting. There would be a balance of \$1,817.59 still in the hands of the said Horace N. Hawkins to cover the services which were to be performed in relation to the said estate in Colorado, including the assessment and payment of the inheritance tax and the expense of the final accounting.

As the executrix has been discharged and the accounting settled, I see no reason why I should in any way change the amount of the expense, part of which has been paid and part of which was estimated, as set forth in the accounting. The appraiser should modify his decree by deducting the expenses of administration as estimated by Surrogate Millard in the decree, amounting in all to the sum of \$4,632.90.

The expenses of administration were without doubt a proper item for deduction in this proceeding. There is no doubt that the surrogate or appraiser has the right to estimate a portion of the expense of such administration. *Matter of Westurn*, 152 N. Y. 100; *Matter of Gould*, 19 App. Div. 352.

In *Matter of Gould* the court held as follows: "The expenses of administration were, without doubt, a proper item for deduction in this proceeding. The only question is whether the amount of such expenses could be arrived at by estimating the same in part, as was done in this instance. The evidence given before the appraiser was that \$75,000 had already been

expended, and that \$75,000 more would be expended in the administration of the estate. It has for many years been the practice in the city of New York to arrive at the amount of the expenses of the administration to be deducted in these proceedings in this manner, and we see no objection to it."

The appraiser should modify his decree accordingly.

As to the second question: The testator by his will, after making certain specific bequests, makes the following bequest under paragraph "Second."

"*Second.* All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath as follows:

"(1) One equal one-half thereof to my wife, Minnie O. Granfield;

"(2) One equal one-half thereof to my daughter, Olive L. Granfield, for and during her natural life, with full power to my said daughter to invest and reinvest the same as she may see fit and to dispose, by sale or otherwise, of such portions thereof as she may deem necessary and to make, execute and deliver good and sufficient deeds, mortgages, leases, and other instruments affecting any real estate which may form a portion of her said share of my estate. On my daughter's death I give, devise and bequeath said one-half of my estate, or so much thereof as shall then remain, to her issue, if any survive her, in equal shares, and if no issue survive her then in equal shares to my brother, Walter Granfield, and my sisters, Emily Crawford and Nellie Granfield."

The appellant contends that these provisions give the daughter, Olive L. Granfield, a life estate with the absolute beneficial power of disposition of the principal during her lifetime with the remainder over of such part as she may not dispose of to the persons named and that the order assessing the tax, in so far as it assesses a tax upon the remainder interest value at \$11,703, by the appraiser should be vacated

and set aside and an order should be entered postponing the taxation of said remainder interest until such time as the clear market value can be ascertained and determined.

The question presented involves a construction of the will of Horace Granfield, deceased. Does the clause give to Olive L. Granfield a life estate and does it give her power of disposition of the property during her lifetime? The testator gave his daughter, Olive L. Granfield, power to dispose by sale or otherwise of such portions thereof as she might deem necessary. In the next sentence he states on his daughter's death "I give, devise and bequeath said one-half of my estate, or so much thereof as shall then remain * * *." This shows very clearly that he had in contemplation not only the giving of a life estate to his daughter but also power to dispose of the principal of the estate in case she should so desire. *Mitchell v. Van Allen*, 75 App. Div. 297; *Seaward v. Davis*, 198 N. Y. 415; *Matter of Comer*, 72 Misc. Rep. 321; *Leggett v. Firth*, 132 N. Y. 7; *Kendall v. Case*, 84 Hun, 124; *Thomas v. Wolford*, 49 id. 145.

In the case of *Mitchell v. Van Allen*, the will of the testator provided as follows:

"*First.* After my lawful debts are paid I give and bequeath to my well beloved wife, Julia L. Mitchell, all of my real estate and personal property of which I may be possessed at the time of my death, for her own personal use and benefit during her natural life and at her death all that may remain and be left is to go to our daughter Mary E. Crawford, wife of John E. Crawford, and in the event of her death (should it occur before the death of her mother) then it shall be for the sole use and benefit, of my grandson, George Mitchell Crawford."

The court held that the language of the will indicated the intention of the testator to give his widow not only a life

estate in the land but power of disposition and use of the proceeds.

Leggett v. Firth seems to be conclusive authority upon the construction of the clause in question. The will in that case contained a provision that if the personalty was insufficient to pay the legacies, enough real estate should be sold for that purpose, followed by the clause: "I also give, devise and bequeath to my wife all the rest and residue of my real estate but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them."

The court said: "'The remainder, if any' means the same as 'if there shall be any remainder' and the gift over is of what may be left. As it would all be left unless there was a right to dispose of it, it follows by necessary implication that he intended his wife should have that power. Otherwise the words 'if any' must be rejected as having no meaning whatever."

In the *Kendall* case the will contained a clause reading: "I give, devise and bequeath to my beloved wife, Polly, the control, use and incomes of all my property, both real and personal, of every nature, for her own benefit, so long as she lives, and after the death of my wife, Polly, and after the payment of the funeral charges and erection of suitable tombstones, if any of said real or personal property is left, I order my executor to divide said remainder, share and share alike, and to pay my said children or heirs as follows:"

It was held that the widow had the life estate with power to dispose of the corpus of the estate.

In *Thomas v. Wolford*, the language of the will was: "After all my lawful debts are paid and discharged I give and bequeath to my wife Eliza J. Thomas, all of my real and personal estate, that I may die possessed of, during her lifetime, and at

my wife's death the property, should there be any left, to be divided among the children or their heirs."

The court held that during life the widow had the power of disposition of the estate, the power to consume and dispose of it as might become expedient and necessary to secure its beneficial enjoyment and upon her death such estate as had not been consumed by her was devised to the children.

In the case of *Seward v. Davis*, the third clause of the will was as follows: "I give and bequeath all my personal property of every name and kind to my wife, except my piano, which I give to Lillie Corwin aforesaid. Whatever personal estate may remain at the decease of my wife I give and bequeath to Briel Davis and Abigail Davis, the parents of my wife, or if they are not living, then to my sisters aforesaid and Lillie Corwin, share and share alike."

The court, Chief Justice Cullen writing the opinion, at page 419, stated as follows: "On the merits, we are of opinion that the will of William Z. King was properly construed by the Appellate Division on the first appeal in this case. *Tuthill v. Davis*, 121 App. Div. 290. That is to say, its effect was to give the widow a life estate with the absolute power of disposition during her lifetime, with a remainder over of such part as she might not dispose of to the persons named in the will. Citing *Terry v. Wiggins*, 47 N. Y. 512; *Crozier v. Bray*, 120 N. Y. 366; *Leggett v. Firth*, 132 N. Y. 7. * * * In this case, however, the widow had the right to dispose of the property in her lifetime and as to such property as she did dispose of neither she nor her executor was bound to account to the remaindermen because they had no interest in it. If none of the husband's property remained at the time of the widow's death or could be found at that time, as stated by the defendant, it is evident that the widow had disposed of it. * * *. We are, therefore, of opinion that the burden

rested on the plaintiff to show that some part of the husband's estate passed to the defendant or was in his possession, and the modification of the interlocutory judgment made by the Appellate Division was correct."

Upon the authority cited I am of the opinion that the language of the will indicates the intention of the testator to give his daughter not only a life estate in the corpus of the estate but power of disposition and the use of the proceeds. Any other construction would ignore the words: "to dispose by sale or otherwise of such portions thereof as she may deem necessary * * *" and "On my daughter's death I give, devise and bequeath said one-half of my estate or so much thereof as shall then remain * * *."

After this construction of the will, the question then presented is: should any tax be assessed and collected at the present time upon the interest given by this will to the remaindermen in view of the fact that the testator gave to his daughter not only a life estate in the land but power of disposition and the use of the proceeds.

The attorney for the comptroller contends that the interest given by the will of the testator in the second clause should be immediately appraised and assessed and the tax paid under the following clause of section 230 as amended by chapter 368 of the Laws of 1905: "When property is transferred in trust or otherwise and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor or trustee out of the property transferred."

Section 222 of the same law provides that: "All taxes

imposed by this article shall be due and payable at the time of the transfer, except as hereinafter otherwise provided. Taxes upon the transfer of any estate, property or interest therein, limited, conditioned, dependent or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and be due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof."

In this case the clear market value of the property transferred cannot be ascertained until the death of Olive L. Granfield. To tax the estate at the present time, in the event nothing should ultimately pass to the remaindermen, would be imposing a tax upon the property and not upon the transfer, in direct conflict with the whole theory of the transfer tax.

Matter of Babcock, 37 Misc. Rep. 445; *affd.* 81 App. Div. 645, seems to be directly in point with the case at bar.

Surrogate Grant in writing the opinion, and after considering sections 230 and 222 of the Tax Law (being Laws of 1899, chap. 76) at page 447 states as follows: "The language of the amendment relied upon by the respondent (meaning section 230) 'and such tax shall be due and payable forthwith out of the property transferred' does not necessarily mean that the property transferred shall be immediately appraised and assessed in cases where the clear market value cannot be ascertained and determined. Nor does it mean that the tax shall be due and payable forthwith 'out of the property transferred,' before the property transferred is appraised and the amount of the tax ascertained and determined. In this case the clear market value of the property transferred cannot be ascertained until the death of William E. Brown. To tax the

estate at the present time would be, in the event nothing should ultimately pass to the remaindermen, imposing a tax upon the property and not upon the transfer, in direct conflict with the whole theory of the transfer tax."

The question considered in the Babcock case was pursuant to chapter 76 of the Laws of 1899. The portions of sections 230 and 222 as cited above are exactly the same as sections 230 and 222 as amended by chapter 368 of the Laws of 1905.

I have carefully considered section 230 of the Tax Law, as amended by chapter 368 of the Laws of 1905 which applies to the case at bar, and I find nothing which indicates any intention to repeal, by implication or otherwise, section 222 of the Tax Law respecting the appraisement of this class of conditional transfers. Surely the fair market value of the remainder cannot be ascertained until the death of the life tenant, at which time the remaindermen, being the parties beneficially entitled thereto, will come into the actual possession or enjoyment of what may be left of the corpus of the estate. If section 222 means anything, it must mean that in a case of this kind the taxing of the remainder interest should be postponed until such time as a clear market value can be established and determined. The clear market value can only be established and determined at the death of the life tenant.

The testator died on May 7, 1911. The rate of taxation, therefore, is determined by the provisions of section 220 and 221 of the Tax Law, as they existed at the time of the death of the decedent and as the same were amended by chapter 600 of the Laws of 1910 and chapter 706 of the Laws of 1910.

Under the provisions of section 221 of the Tax Law the persons subject to "primary rates" and to multiples thereof, depending upon the amounts involved, are, father, mother,

husband, wife, child, brother, sister, or any lineal descendant and the rates are one per cent. upon an amount of transfer not exceeding \$25,000 and two per cent. upon an amount in excess of \$25,000, but not exceeding \$100,000. The attorney for the comptroller concedes that the highest rate possible in the case at bar is two per cent. This seems to be the proper view of the matter. In no case could the rate be five per cent. and whether the rate is one per cent. or two per cent. depends upon the amount of the remainder interest transferred. If the same is under \$25,000 the rate will be one per cent. and if over \$25,000 the rate will be two per cent.

As to the second question raised by the appeal, an order may be entered vacating and setting aside the order assessing the tax herein in so far as the same may affect the remainder interest, and the time for appraising and assessing the tax upon the said interest transferred by the will of Horace Granfield may be postponed until the death of the life tenant when the clear market value can be ascertained and determined.

Decreed accordingly.

**Matter of the Appraisal under the Transfer Tax Acts of the
Property of GEORGE W. PITOU, Deceased.**

(Surrogate's Court, Kings County, February, 1913.)

**TAXES—TRANSFER TAX ON ALLEGED TRANSFER OF A ONE-HALF INTEREST IN
FIVE CERTAIN MORTGAGES—EVIDENCE.**

Where the assignment of five bonds and mortgages to a husband and his wife and the survivor of them, with *habendum* to them and the survivor of them, to their assigns and the successors, legal representatives and assigns of such survivor, contained a power of attorney to the husband and wife, or the survivor of them, to discharge the mortgages, and only three of said assignments contained a statement that it was the intention that the survivor of the husband and wife should become the absolute owner of the bond and mortgage and that neither should have power to affect the right of the survivor, and there is no ground for a finding as to the ownership of the funds which went to the purchase of the five bonds and mortgages except the presumption that the husband and wife were the equal owners of the fund and the investment, it must be held that each owned his or her half down to the time of the husband's death; and an order imposing a transfer tax on an alleged transfer of the husband's one-half interest in the five mortgages will be affirmed, on the ground that the evidence forbids a finding of joint tenancy, and that the husband who was survived by his wife had an interest which was transferable only upon his death.

APPEAL by an executrix from the imposition of a tax upon the alleged transfer of an interest in certain mortgages.

Joseph H. Lecour, Jr., for executrix, appellant.

Harry Howard Dale, for State Comptroller, respondent.

KETCHAM, S.—The executrix appeals from the imposi-

tion of a tax upon the alleged transfer of one-half interest in five mortgages.

These mortgages and the bonds accompanying the same were transferred to the decedent and his wife and the survivor of them, with *habendum* to them and the survivor of them, to their assigns and the successors, legal representatives and assigns of such survivor. The instruments of assignment contain a power of attorney to the husband and wife, or the survivor of them, to discharge the mortgages.

Three of the assignments contain the following which is not found in the other two assignments: "It being the intention that the survivor of the said George W. Pitou and Annie B. Pitou (the husband and wife) shall become the absolute owner of this bond and mortgage, and that neither the said George W. Pitou nor the said Annie B. Pitou shall have power to affect the right of the survivor thereof."

The appeal is based upon the assumption that the husband and wife held these mortgages as joint tenants, that they each took the entire interest in each mortgage at the time of its assignment and that, therefore, no interest therein of the husband passed at his death.

Courts have said that deposits and investments made in the names of two persons, where the right of survivorship appears, constitute a joint tenancy, and this theory has been enacted in the Banking Law with respect to savings bank deposits. Banking Law, section 144. The judicial statements are generally found in cases which have nothing to do directly with the nature of the ownership of the parties during life and involve only the disposition of the fund after a death has occurred. Except in circumstances arising under the Transfer Tax Law, the status of the parties to the transaction, while living, has not been the primary subject of determination.

Expressions to the effect that a joint tenancy has been

created are not convincing, for it is difficult to conceive how the elements of joint tenancy can be imposed upon the transaction. However the community of husband and wife has been resolved by legislation, at common law joint tenancy was impossible between man and wife and they are most frequently the parties to this class of investments.

In many of the cases of deposit or investment in two names the circumstances indicate an intention that one of the parties named shall during the life of the other exercise the right of dominion and consumption over the fund, a condition inconsistent with joint tenancy. Indeed, a power in either or both of the parties to withdraw any part of the fund from the common control is incompatible with joint tenancy, as much as would be the right of one of the two owners of land to convey a portion. The interest of a joint tenant cannot be reached by execution for his debt, since the enforcement of the processes would take the property of a stranger to the execution. Is it necessary to the just maintenance of the wife's right of survivorship to give her such tenancy in a deposit wholly made up of the husband's money? It has happened, in some instances, that one of the parties to the deposit or investment has reserved the power to dispose of the fund by will, a right which cannot exist in joint tenancy.

Where the nature of the relations to the fund is so often to be derived from parol evidence of the acts, declarations and understanding of the parties, it is as dangerous as it is unnecessary to assume a joint tenancy or any other kind of tenancy, unless the intention to create it affirmatively appears. It is dangerous, because unless the intention to create a joint tenancy appears expressly, it should not be loosely gathered from the mere intention that the survivor should take the whole fund.

Few persons arranging for one of these deposits or invest-

ments contemplate anything except a means by which the survivor shall have the entire interest in case of death. Very few desire or, indeed, would understand the highly technical conditions which surround joint tenancy. To assume that relation is unnecessary when the death has occurred, for it is sufficient then for every determination to find, without regard to the kind of tenancy or, indeed, the existence of any tenancy together while the parties were alive, that the agreement or intention of the deceased party was that the survivor should enjoy the fund.

There is a growing opinion in the cases that the disposition of these deposits or investments in the case of death should be vested wholly upon the agreement or intent as to the disposition upon death. If this be so, the nature or the existence of any tenancy in both parties during life is unimportant except so far as it bears upon their intention. *Kelly v. Beers*, 194 N. Y. 49; *Matter of Meehan*, 59 App. Div. 156; *West v. McCullough*, 123 id. 846; *affd.*, 194 N. Y. 518; *Moore v. Fingar*, 131 App. Div. 399, and cases cited; *Matter of Kline*, 65 Misc. Rep. 446; *Matter of Eysel*, 65 id. 432.

Suggestions of joint tenancy made in the current of argument in cases where the disposition of the interest after the death was the only event to be considered may well be regarded as *obiter*.

If, therefore, the case at bar, which solely concerns the nature of the ownership during the lives of both parties were found to match with earlier cases in all respects, except that in them the only question to be decided was whether after death the survivor was entitled to take, the present decision would not be constrained by authority.

This court personally questions that the ordinary arrangement under which these deposits or investments are made creates a joint tenancy. The proposition is expressly denied

in many cases in which the surviving party to the investment is held to take no legal interest therein until the death of the other party. Matter of Kline, *supra*; Wegman v. Kress, manuscript opinion by Blackmar, J., February 19, 1912.

Whether this be so or not, there was joint tenancy in this case. There is no ground for a finding as to the ownership of the funds which went to the purchase of the securities except the presumption that husband and wife were equal owners of the fund and the investment. Wetherow v. Lord, 41 App. Div. 4123; Matter of Kaupper, 141 id. 54; Matter of Wilkens, 144 id. 803.

Hence, each owned his or her one-half down to the moment of the decedent's death. As in Matter of Spring, 75 Misc. Rep. 586, each was presumptively and, therefore, in the absence of proof, actually entitled to a separate one-half both of the income to accrue and the principal which produced it. If, then, the decedent owned his one-half until he died and his wife became its owner when he died and because he died, the transfer of the decedent's one-half was within the statute a transfer "intended to take effect in possession or enjoyment" upon his death and was properly taxable.

Matter of Kline, *supra*, presented facts exactly the same as those at bar, except that it there appeared that a part of the money which went into the deposit belonged to the wife individually when deposited, but the precise amount did not appear. While that case was remitted for inquiry as to the exact amount of money which belonged to the wife when deposited, the court definitely held that such parts of the different deposits as were not the moneys of the wife when deposited were taxable; and this court is not only controlled by the authority of the case cited, but is in accord with its reasoning.

There is much in the assignments to reveal the intention that it was only as a survivor and in the event of survivorship .

that either party could take the securities; but the order is affirmed upon the ground that joint tenancy is forbidden by the evidence and that the decedent had an interest which was transferable only upon his death.

Decree affirmed.

In the Matter of Proving the Paper Alleged to be the Last Will and Testament of HENRIETTE SWARTZ, Deceased.

(Surrogate's Court, New York County, February, 1913.)

WILLS—EXECUTION OF, UNDER MISTAKE AS TO LEGAL EFFECT OF CERTAIN TRUST DEEDS—PROBATE OF.

Where parts of a will were duly executed under a mistake as to the legal effect of certain trust deeds executed by testatrix to which reference was made in the will, the instrument cannot be refused probate.

In the proceedings for probate the respondents ask for a construction of the will pursuant to section 2624, Code of Civil Procedure. The pertinent portions of the will of Mrs. Henriette Swartz, for the purpose of construction, are as follows:

"Tenth. I give and bequeath to my daughter, Annie S. Lyon, the sum of five thousand (\$5,000) dollars, to be hers absolutely, and I direct my executrices and executor, hereinafter named, to pay the said sum to her at the earliest possible moment after my decease.

"Eleventh. I give and bequeath to my daughter, Emily S. Andrews, the sum of seven thousand (\$7,000) dollars, to be hers absolutely, and I direct my executrices and executor, herein-

after named, to pay the said sum to her at the earliest possible moment after my decease.

"Twelfth. I give and bequeath to my daughter, Priscilla S. Eisenbach, the sum of one thousand (\$1,000) dollars, to be hers absolutely, and I direct my executrices and executor, hereinafter named, to pay the said sum to her at the earliest possible moment after my decease.

"Thirteenth. Whereas on the 26th day of April, 1904, by a certain instrument in writing, I have paid over to my son-in-law, Lester J. Saul, as trustee, the sum of seven thousand (\$7,000) dollars in cash; and whereas on the 28th day of October, 1905, by a certain instrument in writing, I have paid over to my son in-law, Lester J. Saul, as trustee, the additional sum of three thousand (\$3,000) dollars, making the sum ten thousand (\$10,000) dollars in all; and whereas the said instruments provide that the said sum of ten thousand (\$10,000) dollars is to be invested, reinvested and kept invested by my said son in-law, Lester J. Saul, as trustee, and the net income therefrom paid to me by my said trustee during the term of my natural life; and whereas the said instruments provide further that upon my death my said trustee is to divide and apportion the said sum of ten thousand (\$10,000) dollars amongst my surviving daughters; now I hereby direct that instead of the said sum of ten thousand (\$10,000) dollars being divided amongst my surviving daughters, as provided in said instrument, it be divided by my said trustee into two equal parts of five thousand (\$5,000) dollars each; five thousand (\$5,000) dollars thereof to be paid to my daughter, Rebecca S. Saul, and five thousand (\$5,000) dollars thereof to be paid to my daughter, Priscilla S. Eisenbach; for the reason that in paragraph 'fourteenth,' hereafter, I am making provisions for my daughters Annie S. Lyon and Emily S. Andrews in lieu and in place of their interest in the said fund of ten thousand (\$10,000)

dollars, in which I direct that they shall not share or participate.

"Fourteenth. All the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situate, of which I may die seized or possessed or to which I may be entitled at the time of my death, I give, devise and bequeath in equal shares to my daughters, Annie S. Lyon and Emily S. Andrews, or to the survivor of them, to be their or hers absolutely, and this provision is made for my said daughters, Annie S. Lyon and Emily S. Andrews, in lieu of and in consideration of their or her non-participation in the fund directed to be distributed by paragraph 'thirteenth' heretofore.

"Fifteenth. Should any of the bequests made by me in the foregoing paragraphs of this my will lapse or fail for any reason I direct that the bequest or bequests so lapsing or failing, except where other provision is made, shall go to and form part of my residuary estate and be disposed of under and in accordance with the provisions of paragraph 'fourteenth' heretofore.

"Sixteenth. The reason that I have made a greater provision for my daughter Emily S. Andrews than for my other daughters is not that I bear her any greater love as a mother, but realizing that she is a widow and is without a husband's support, which my other daughters enjoy, it is not my wish to leave her in a dependent position."

On the hearing the parties put in evidence, without objection, the two trust deeds or instruments referred to in the thirteenth clause of the will. It was conceded that the value of the estate was approximately \$25,000, exclusive of the \$10,000 covered by the trust deeds, and deducting therefrom the specific legacies of \$13,000, the residuary estate is worth approximately \$12,000, subject to deductions for expenses of administration and possible debts not believed to be large.

Phillips, Mahoney & Wagner (Jeremiah J. Mahoney and Warren C. Fielding, of counsel), for petitioner.

Cardozo & Nathan (Edgar J. Nathan and Raymond Rubenstein, of counsel), for respondent Annie L. Lyon.

Simpson & Cardozo (Benjamin N. Cardozo and Walter H. Pollak, of counsel), for respondent Priscilla S. Eisenbach.

FOWLER, S.—This is an appeal to the jurisdiction of the surrogate for relief against an alleged mistake on the part of the testatrix. It involves the whole scope of the surrogate's present jurisdiction in a proceeding for probate and construction. The arguments of counsel in this cause suggest to my mind important questions the consideration of which can no longer be postponed or passed over by me. The arguments of counsel have been unusually thorough and profound. *Prima facie* the script propounded as a will in this matter is, on the proofs of its execution, given under oath, entitled to probate. *Factum* of will, in other words, is established. This is conceded by all the counsel in the cause. But in a rather vague way, notwithstanding this attitude, the effect of a part of a will is sought to be rejected from probate. A mistake is alleged on the part of the testatrix, and this is made the basis of an opposition to the probate of the thirteenth and fourteenth clauses of the will propounded. This appeal is addressed to the powers of the surrogate sitting as a probate judge, and not to his power as a court of construction under section 2624, Code of Civil Procedure.

The powers of the surrogate as a court of probate are due primarily to the statute. Code Civ. Pro. § 2472. The section is very general in phrase. It confers jurisdiction on the surrogate "To take the proof of wills; to admit wills to probate." The statute does not define "proof of wills" or "probate," and

such definition and the powers of the surrogate in probate matters are referable to the jurisprudence established in this state by the Constitution itself. Code Civ. Pro., § 2481, subd. 11. See *Matter of Work*, 76 Misc. Rep. 403, 405; *Matter of Connell*, 75 id. 574, 578; *Matter of Carter*, 74 id. 1, 6; *Matter of Meyer*, 72 id. 566, 568, but more particularly the authorities cited in these cases. Were these judicial powers not so defined the surrogate's powers and procedure in proceedings for probate would be left much too vague. A surrogate was not intended in probate proceedings to be a law unto himself, but to proceed according to established precedents, and with reference to the general law imposed by the Constitution of the state. *Campbell v. Logan*, 2 Bradf. 90, 93; *Martin v. Dry Dock, E. B. & B. R. R. Co.*, 92 N. Y. 70, 74; *Jones v. Hamersley*, 4 Dem. 427; *Matter of Carter*, 74 Misc. Rep. 1, 7; *Dayton Surr. Pr.* 9; *Redf.* 26; *Jessup Surr. Pr.* 5.

Long prior to any statutes conferring on surrogates those powers incidental to courts of construction it was held by Surrogate Bradford that the surrogate as an incident of his probate jurisdiction had power to refuse probate to part of a will if fraud or mistake was established. *Burger v. Hill*, 1 Bradf. 360; confirmed by *Hill v. Burger*, 10 How. Pr. 264. This notable decision of this very learned probate judge has been much objected to in several states while followed in others. Right or wrong, the decision in *Hill v. Burger* is binding on me. It may be remarked that such power is distinctly recognized in the law which is commonly taken as the exemplar of our own authority in cases of doubt and difficulty not settled by the law and practice of this state. *Allen v. McPherson*, 1 H. L. 191; *Goods of Duane*, 2 S. & Tr. 590; *Goods of Oswald*, L. R. 3 P. D. 162; *Morrell v. Morrell*, L. R. 7 P. D. 68, 1882; *Plume v. Beale*, 1 P. Wms. 388; *Billinghurst v. Vickers*, 1 Phill. 187. Cases in the Ecclesiastical Courts of England, although decided

since our independence of England, are still of some indirect authority here. The foreign law of probate, like the foreign law relating to notaries or to admiralty matters, stands on a different foot in this court from other foreign law, by reason of the similarity and universality of operation of probate law, probate being a proceeding *in rem*. *Betts v. Jackson*, 6 Wend. 183, 202. It would be quite at variance with propriety for me to express my own opinion on the power of the surrogate to refuse probate to a part of a will in view of the decision in *Hill v. Burger*, although I am free to say that I should never be inclined to stretch the jurisdiction of this court beyond the most well defined limits. *Matter of Meyer*, 72 Misc. Rep. 566. But within those limits I should be tenacious of my jurisdiction. A jurisdiction is not for the benefit of a judge, but a matter of public concern which demands the greatest consideration, and for that reason only the surrogate should not be slow to assert and protect his jurisdiction.

That a court of probate has no power incidental to its general probate jurisdiction to add words to a will, even if omitted by mistake, is often asserted. *Theobald Wills*, 29; *Mortimer Probate Law*, 103; 1 *Jarman Wills* (6th ed.), 486; *Burger v. Hill*, 1 Bradf. 374; *Creely v. Ostrander*, 3 id. 107. While this is generally true, these statements all appear to have overlooked a decision to the contrary in *White v. Barber*, in the year 1771, 5 Burr, 2703. This case before the Revolution is binding here. *Castell v. Tagg*, 1 Curteis, 298, proceeds to the same point, and there are others to the same effect. A power to strike out a will *prima facie* would seem to imply a correlative power to insert proper words sometimes omitted by mistake. But much depends on the Statute of Wills for the time being in force. *Matter of Goods of Wilson*, 2 Curteis, 853. But as this particular point is not now here, it need not be considered at this time.

The correction of the alleged mistake of this testator is not addressed to the jurisdiction committed to the surrogates of this state by section 2624 of the Code of Civil Procedure. It may be well, in passing, to consider the general scope and purport of that section. By reference to it it will be perceived that it is only after a will is determined to be entitled to probate that the surrogate may sit as a court of construction. It is true that the *factum* of will may be formally adjudged by the same decree which construes the will so found entitled to probate, but the adjudications rendered in the separate spheres of jurisdiction are nevertheless distinct acts of the surrogate. *Matter of Davis*, 182 N. Y. 475. The validity, construction or effect of any disposition contained in a will of a resident of this state when entitled to probate may now in a proper case be determined by the surrogate sitting as a court of construction, but not as a probate judge. Code Civ. Pro. § 2624. The precise extent of the jurisdiction of the surrogate as a court of construction is nowhere defined. Consequently we must look to the law of this state regulating similar jurisdictions. *Betts v. Jackson*, 6 Wend. 188; *Matter of Carter*, 74 Misc. Rep. 1, 7; *Matter of Matthews*, 75 id. 449, 453. The measure of the surrogate's jurisdiction as a court of construction will be found either in the jurisdiction of the courts invested with equitable powers or that of the courts proceeding according to the course of the common law or both. It cannot be maintained for an instant, I think, that a court of law ever entertained a jurisdiction to correct a mistake in a devise. The exercise of power of a court of law over devises was confined, whether in ejectment actions or otherwise, to the single issue of *devisavit vel non*. Common law jurisdictions related wholly to legal titles under wills or to matters *in pais*. Mistakes were *prima facie* of equitable cognizance only. As nothing is to be found in the constitution of courts of law, we must next resort to the law regu-

lating the jurisdiction of courts vested with powers of construction over wills for the necessary limitations on the powers of the surrogates.

The extent and the exercise of the jurisdiction of the surrogate as a court of construction are controlled either by the new section 2624, Code of Civil Procedure, or by the decisions of our own state, or in the absence of such decision by the law imposed on us by constitutional limitation. So clear a proposition needs no citation of authority. The power of courts of equity over wills is referable to the want of jurisdiction of courts of law, but more particularly to their jurisdiction over mistakes and trusts. For this purpose executors have been regarded in equity as trustees. Story Eq. Juris., §§ 164, 1067. By a "court of construction" a court of equity is intended. *Burger v. Hill*, 1 Bradf. 372. In regard to mistakes in wills there is no doubt that courts of equity had jurisdiction to correct them in some instances to be hereafter noticed. 1 *Jarman Wills* (4th Am. ed), 359, note. But the power of equity, independent of statute, to construe wills is referable to a jurisdiction over trusts, and where no trust is involved jurisdiction is generally to be declined. *Dill v. Wisner*, 88 N. Y. 153, 160; *Matter of Keleman*, 126 id. 73; *Mellen v. Mellen*, 139 id. 210, 217; *McKinlay v. Van Dusen*, 76 App. Div. 200.

A court of equity would in no case correct an erroneous supposition of the testator if he knew the contents of his will. *Burger v. Hill*, 1 Bradf. 372; *Walpole v. Cholmondeley*, 7 T. R. 138, s. c. *Lord Walpole v. Lord Orford*, 3 Ves. 42; *Matter of Bywater*, 18 ch. D. 17. The earlier editions of *Jarman on Wills* review the English cases on this point, although the sixth edition omits them. 1 *Jarman Wills* (4th ed.), 353-359. The language of section 2624, Code of Civil Procedure, invests the surrogate with a larger jurisdiction over the construction, validity and effect of wills than that formerly possessed by

courts of equity I have no doubt. *Matter of Mount*, 185 N. Y. 162, 167. No trust or mistake need be involved in order to invoke the jurisdiction granted to the surrogate, and he may now pass on the validity of legal as well as of equitable titles derived under the will before him. *Matter of Mount*, *supra*. But this at bar is not a case of construction, but of probate law only.

That the surrogate may under section 2624, Code Civil Procedure, sometimes consider oral or extrinsic evidence in a proper case, in order to enable him to construe or determine the validity of a will is, in my mind, not open to doubt, and I shall remain of this opinion until directly advised to the contrary by my superiors in the appellate courts. Unless the surrogate has power to consider extrinsic evidence in a proper case of construction, falling under section 2624, the beneficial effect of that section will be nullified. The surrogate's jurisdiction of construction will in that event be confined to the single issue of validity or invalidity on the face of the testamentary scripts probated in the proceeding. He will be unable to consider an ambiguity or uncertainty raised by extrinsic circumstances and removable in any other court of construction by extrinsic evidence. The few adjudicated cases bearing on this section cannot be taken to intend to restrict a jurisdiction so plainly conferred on the surrogate by the legislature. See *Matter of Keleman*, 126 N. Y. 73; *Morton Trust Co. v. Sands*, 195 id. 28. Such decisions do not cover the hypothetical case. The surrogate has all the powers fairly implied in the grant of jurisdiction.

But the point here is that section 2624, Code Civil Procedure, is not an authority for the surrogate's jurisdiction to construe the offensive clauses out of the will. If any relief is to be granted by the surrogate it must have reference to the power of the surrogate as a probate judge. In this view section 2624 of the Code of Civil Procedure becomes quite immaterial and is

outside of consideration in this matter now before me. This is not a case of construction, and construction is not properly invoked or involved. *Jones v. Hamersley*, 4 Dem. 437; *Matter of Mount*, 185 N. Y. 162, 167. It is possible that a court of equity may consider some form of relief for discrepancies apparent on the face of the will as proved, taking into just consideration the claims of those entitled also under the trust deeds. But such matters are not properly cognizable here (*Milner v. Milner*, 1 Ves. Sr. 106), and their consideration should not be volunteered.

Formerly and at present the only remedy in cases of mistake on the face of a will is in a court of probate. 1 *Jarman Wills* (6th ed.), 493, and cases there cited; *Burger v. Hill*, 1 Bradf. 372, 373; *Allen v. McPherson*, 1 H. L. 191. If such will is admitted to probate there is no remedy in any other court. *Burger v. Hill*, 1 Bradf. 373.

While I think that the parties before me may have by the course hitherto taken virtually put themselves out of court and technically assented to the probate of the script propounded, and in consequence I might be relieved from any further consideration of this matter, yet this is too technical. It is not too late for them, I think, to object to the probate of parts of this will by reason of the alleged mistake. I shall assume that this is their desire and will now proceed to the consideration of the merits of this controversy. It may be assumed that it is discernible on the face of the will that the testatrix mistook the legal effect of the trust deeds referred to by her in the thirteenth clause of her will. Does that fact, if established, enable the surrogate to refuse probate to the tenth and fourteenth clauses of a will duly executed under such mistake? That is the only question in the cause. If the mistake is of that character which may be corrected by a court of probate, only that part of the will entitled to probate will be annexed to the

decree of probate. *Billinghurst v. Vickers*, 1 Phill. 187; *Wood v. Wood*, id. 357; *Matter Goods of Duane*, 2 Sw. & Tr. 590; *Burger v. Hill*, 1 Bradf. 373; *Creely v. Ostrander*, 3 id. 107; *Strahan Wills*, 68; *Matter of Finn*, 1 Misc. Rep. 280, 283. This is not a case of dependent relative revocation, and that doctrine invoked by counsel has no application. This is the case of an alleged mistake on the part of testatrix and its legal effect on probate alone.

While I am bound to hold, in view of the decisions of this state already noticed, that there are some kinds of mistake on the part of testatrix, such as mistakes of draftsmen in preparing wills or of engrossers in the engrossment of the same, or mistakes induced by fraud on testators which may possibly be corrected in this court in a proper case, yet the mistake of this testatrix concerning the legal effect or revocability of her trust conveyances is not such a mistake as can be corrected here. The same point is adjudged in England. In *bonis Davy*, 1 Sw. & Tr. 263; *Guardhouse v. Blackburn*, 1 P. & D. 109; *Harter v. Harter*, 3 id. 11; *Collins v. Elstone*, 1893, P. 1; *Beamish v. Beamish*, 1894, 1 Ir. 7; *Theobald Wills*, 719. The true principle applicable in this cause is, as I conceive, well stated in the sixth edition of *Jarman on Wills*, 486, and in this cause that passage has my approval: "If, however, the testator knows the contents of his will and erroneously supposes that it will not have the effect which the law gives it, the general rule applies and evidence of his real intention is not admissible." In other words, such a mistake as that here alleged is not the basis of a correction by a court of probate. The cases of established intention of testators to make wills other than those actually made are not to be mistaken for cases where testators have placed in their wills just what they intended, but with effects different from those which they intended. The latter class of

mistakes is not remediable in a court of probate under the existing Statute of Wills. This case belongs to the latter class.

The principle of all the American and English adjudications bearing on the point before me has now been briefly considered. It remains to consider two remarkable instances cited from the Roman Law in the very elaborate argument of the learned counsel for Mrs. Eisenbach. I may remark that there are many occasions in this court when it is held that the Civil or Canon Law well serves to illustrate a derivative principle frequently applied in this court, or, in the total absence of modern authority, as a guide for this court. I referred to the authorities on this point in my judgment on the Will of Van Ness, 78 Misc. Rep. 592. But I fear the instances now cited by the learned counsel in this matter are not within the limitations there stated. Let us examine them. In the Latin of counsel's argument, the first instance is taken from the *de Oratore* of Cicero (1, 38, 175) as follows: "*Pater credens filium suum esse mortuum alterum instituit haeredem; filio domum redeunte, hujus institutionis vis est nulla.*" I do not find the exact quotation in the *de Oratore*. But the case is there mentioned in other words not materially different. On its face this case would appear to be addressed to a mistake of fact by a testator and to be very much in point here, but it is not so. Cicero, it will be observed, does not furnish us with the judgment in the case. The judgment is, however, given by Valerius Maximus (VII. 7, 1). The son in question was a soldier, and he succeeded in the case. By the merest chance I happened to have read in a late book a discussion on this very case or I should know little of it. Girard Manuel de Droit Romain, 853 *et seq.* The case in Cicero did not turn at all on a mistake of fact on the part of testator, but on the law relating to the exherison of a son. At that time a son was a sort of joint proprietor with the father. It was a case of *condominium* and unlawful for the father to

disinherit a son. It was on that ground the judgment proceeded, and not on the ground of a mistake of fact of the testator. The second instance cited to me by counsel is taken from the Digest (28, 5, 92). In the language of counsel for Mrs. Eisenbach this case is as follows: "A striking case on revocation under a mistake is stated in the Digest (Lib. 28, Tit. 5, 92). The testator named Pactumeja Magna as his sole beneficiary, and her father as substituted beneficiary after her. The father was put to death, and the report was that the daughter, too, had been killed. The testator then modified his will, explaining: '*Quia heredes cuos volui habere, mihi continere non potui, Novius Rufus esto.*' As a matter of fact the daughter had not been executed and survived the testator. The inheritance was decreed to pass to her. The law as to wills was then precisely the same upon the point of revocation (Code, 6, 23, 5)." Whether this citation from the Digest also refers to the law relating to *Exhereditio* I am not sufficiently learned to determine for myself, and I do not think it important here to take time to investigate the matter. There are some things, however, in this second case, mentioned in the Digest, which also points to the law relating to exherison. Justinian, or his adviser, Tribonian, in a decree (C. 6, 28, 4) placed daughters in the same position as sons. But if it were otherwise, in this matter and the case in point, I must go by the later cases in our own courts or in their exemplar, as there is modern authority and the point is no longer open. This being so, the Roman law is in any event quite out of all consideration. It is only in the instance of original questions devoid of modern authority that we may resort to the civil or canon law. Jenks' History English Law, 195; Matter of Youngs, 73 Misc. Rep. 335, 339.

The proponents are entitled to a literal probate of the script propounded as the last will and testament of Mrs. Henriette

Swartz. For the reasons fully stated no construction is necessary or proper at this time in this court.

Decreed accordingly.

Matter of the Estate of WILLIAM G. PERCIVAL, Deceased.

(Surrogate's Court, Oneida County, February, 1913.)

**EXECUTORS AND ADMINISTRATORS—JUDICIAL SETTLEMENT OF ACCOUNTS OF
—CODE CIV. PRO. § 829—SURCHARGING ACCOUNTS OF EXECUTORS—
CLAIM FOR SERVICES DURING QUARANTINE OF WIDOW.
WILLS—INTENT OF TESTATOR—ADEMPTION—ADVANCEMENTS—LIFE ES-
TATES.**

Where, upon a conveyance of certain premises to his favorite daughter, the grantor took back a mortgage for the entire purchase price which was never recorded but delivered to and found among his effects after his death, and upon the judicial settlement of the accounts of said daughter as his executrix it satisfactorily appears that while her husband, as he testified, pursuant to an agreement with the testator, assigned certain corporate stock to said daughter, testator never carried out on his part said agreement by satisfying said mortgage or by delivery thereof to his daughter, the husband's parting with stock, independent of the marital relation, was a good consideration for the promise of testator to give the mortgage to said daughter and she as his executrix was not chargeable therewith.

The contingent interest of her husband in the property as tenant by the courtsey did not disqualify him as a witness under section 829 of the Code of Civil Procedure.

Where testator and his wife had given a joint deed of different parcels of land owned by them severally and the purchase price, \$1,000, was paid to testator who deposited the amount to his own credit and made no settlement with his wife, and said daughter as executrix of her father paid to her husband as executor of her mother \$1,024, the account of the executrix will be surcharged with the difference between said sum and the amount she should have paid, \$961.39.

A claim for the services rendered by the wife of a nephew of the deceased testator for alleged nursing of his widow during the quarantine period of forty days disallowed, and the account surcharged with the same and interest at three and one-half per cent. from the date of payment.

No evidence being offered against the bill of the attorneys for the executrix and same being reasonable in amount will be allowed.

Where during the trial a note of the husband of the executrix, which did not bear interest and was not included in the accounts, was paid, the account will be surcharged with the amount of the note, with interest at three and one-half per cent. from one year after grant of letters testamentary.

Testator by his will made in 1899 gave the use of one-half of his estate, real and personal, to his wife for life, with remainder absolutely to his grandson to whom he stood *in loco parentis*; \$2,000 to a granddaughter and the use of an undivided one-half of his estate to two daughters for life. Upon the death of either of said daughters, her share was given to the heirs of her body, share and share alike, and in the event of her leaving no heir her share was also given to the grandson absolutely. In 1905, testator gave to his daughter F., who was also his executrix, a mortgage for \$1,000 which he held on her home, and in 1907, two years prior to his death and without changing his will, he conveyed to L., his other daughter, real property valued at \$3,500, and to the grandson a certain factory which, with its contents, was worth \$15,000. The inventory, as filed, showed an estate of about \$14,000. Held, that it was the intention of the testator that the conveyance to the grandson was to operate as an ademption of all testamentary provisions in his favor, but that testator did not intend to adeem the residuary provisions of his will or any part thereof.

Held, that testator by the conveyance to his daughter L. intended to give her a portion in advance of what she would ultimately take under his will and that \$3,500, the value of the property conveyed to her, should be taken out of the one-fourth of his estate of which she was given the use for life, and that she should have the life use of the difference between that amount and the amount of the net one-fourth of his estate.

PROCEEDING upon the judicial settlement of the account of an executor.

Davies, Johnson & Wilkinson, for executrix, Florence A. West.

Stoddard M. Stevens, for Louise A. Timian, Clayton A. Timian and Grace Mann, contestants.

SEXTON, S.—On September 30, 1909, William G. Percival died at Camden, N. Y., leaving a will in which he named Florence A. West as executrix, and which was probated on May 31, 1910. On December 18, 1911, said executrix filed her account, and on February 28, 1912, Louise A. Timian, Clayton A. Timian and Grace Mann, legatees under said will, filed objections thereto, challenging many items of the account of which only the following remain undecided:

1. The mortgage of \$1,800 due from Florence A. West to the estate of William G. Percival, deceased.

2. The item of \$1,024 erroneously and unlawfully paid by Florence A. West as executrix of the estate of William G. Percival, deceased.

3. The bill of Ormetta Percival for services alleged to have been rendered by her as a nurse in attending Caroline S. Percival, deceased.

4. The bill of Davies, Johnson & Wilkinson for services alleged to have been rendered to Florence A. West, as executrix of the estate of William G. Percival, deceased.

5. The indebtedness of Isaac D. West to William G. Percival, deceased, amounting to \$50 or \$52, which did not appear either in the inventory or in the account filed by the executrix.

6. Ademption of legacies.

These contested items will be considered in the order named.

It seems that on April 4, 1893, the deceased deeded to his daughter Florence A. West a house and lot in Camden, N. Y.,

and took back from her a mortgage for the entire purchase price in the amount of \$1,800, which was never recorded, but delivered to and found among the effects of the deceased. Some payments were made on this mortgage.

The claim of said executor to said mortgage is based principally upon the evidence of her husband, Isaac D. West, from which it appears that in March, 1894, he bought stock from the deceased in the Camden Water Wheel Works, a domestic business corporation, amounting to a third interest, and gave a note for \$6,666.66, with ten shares of said stock as collateral, amounting to \$1,000. On May 6, 1905, the deceased and West met for a settlement, a check was given by West to deceased for \$2,500, which paid the balance of said note except \$50, for which a new note was given. At said meeting it was found that payments in the amount of \$400 made by West had not been credited on said note, nor on said \$1,800 mortgage. West said: "Did you endorse those on that mortgage?" He said: "No, I don't know as I have, but I will." West said: "That must reduce that mortgage to about \$1,000 * * *. You ought to give that to Florence." "Well," he said, "if you will give her a thousand dollars of that Water Wheel stock, I will do it," and West said: "I will do it." He said: "All right," and I had it transferred to him." He said: "I have transferred it to her."

The stock in question was then West's and the deceased had been holding it as collateral to the note.

Exhibits H and I are two certificates of stock in Camden Water Wheel Works, five shares each of \$100 a share. On the date of the alleged agreement between West and the deceased, May 6, 1905, each of said shares, which had been issued to West April 10, 1894, was absolutely assigned by West to said deceased, W. G. Percival, in West's handwriting, and said assignment was witnessed by C. A. Timian, one of the contestants.

On the same day in the writing of attorney, George F. Morse, each of said certificates of stock was absolutely assigned to Florence A. West by said W. G. Percival, deceased.

Said mortgage was not produced or then turned over as agreed, but was found among the effects of the deceased with an endorsement of ten dollars made in the handwriting of deceased under date of April 9, 1908. West testified that he never asked for the mortgage and said he often wondered why he didn't.

This mortgage was produced and listed with other assets of the estate without the knowledge of Mrs. West, but was not included in the inventory by Mrs. West, the executrix and claimant.

Mrs. West knew about the said stock having been assigned to her by her father and since his death she had always claimed said mortgage.

As bearing upon the question as to whether her father and husband entered into the agreement for her benefit, testified to by her husband, we have the evidence of a disinterested witness, Vianna Whitford, who knew the deceased for fifty years.

She gave a conversation with the deceased held a short time before his death in which he said: "I don't want to live if I can't get well. I have been arranging my business and I have given the girls their homes, and I have given Clate the shirt factory."

February 19, 1907, the deceased deeded to his daughter, a contestant, Louise A. Timian, a house and lot on Main street in Camden. This deed confirms what deceased said to Mrs. Whitford as to one of his two daughters; but the expression, "I have given the girls their homes," has no force or meaning except upon the assumption that he had cleared Florence's home in his agreement with her husband.

There is no evidence, nor presumption against this view, be-

cause Florence was his favorite daughter. If West did not pay the deceased \$2,500 by check May 6, 1905, the day the stock was assigned to Mrs. West, that fact could have been shown by the records of the bank on which the check was drawn. Seemingly, deceased, to make sure that his favorite daughter should have West's stock held by him as collateral, required West to assign it to him instead of trusting West to assign it direct to her. On the mortgage in question there is an endorsement of ten dollars in handwriting of deceased under date of April 8, 1908.

It is urged that said endorsement furnishes strong evidence that the deceased never agreed, as West testified, to give Florence the mortgage. At most said endorsement is a declaration of deceased in his own favor and is hearsay, and, while received without objection, I do not consider it as at all controlling, for the reason that the deceased at the time of said endorsement had several interest bearing securities, on any of which said ten dollars might have been paid, and in view of the fact that West positively denies having made said payment to deceased on account of any matter. It is my duty to find that the deceased made a mistake when he made the ten dollar record on the mortgage, Exhibit 3A, as he was a sickly old man, rather than to find perjury on the part of West, who is a respectable business man, and worthy of credence, so far as the record shows.

I hold that the agreement testified to by West was made between him and deceased. West kept his part of it by assigning his stock so that title passed to Florence. The deceased never actually carried out his part of the agreement by satisfying the mortgage or by delivering it to his daughter Florence.

Can such an agreement be enforced? Was there any consideration therefor?

It could have been enforced against deceased in his lifetime

and can be against his estate, and there was sufficient consideration therefor. The relation of husband and wife has been twice recognized in this state as furnishing a sufficient consideration for supporting a covenant in the wife's favor of the character under consideration. *Todd v. Weber*, 95 N. Y. 187; *Buchanan v. Tilden*, 158 id. 100.

Independent of the marital relation, West's parting with title to his stock was a good consideration for the promise of the deceased to give the mortgage to his daughter. *Crook v. Scott*, 65 App. Div. 139.

It is urged that West is interested, being the husband of the beneficiary of the said agreement, hence incompetent as a witness. Objections were interposed, but they did not challenge the competency of West as a witness, but the competency of the evidence. The evidence was competent and being properly in the record it must be considered. *Hoag v. Wright*, 174 N. Y. 36.

West was competent as a witness; the only conceivable interest being a contingent life estate in the premises, cleared by the mortgage gift, as a tenant by the curtesy. Such a contingent interest does not disqualify him as a witness under the provisions of section 829 of the Code. *Hungerford v. Snow*, 129 App. Div. 816; *Bouton v. Welch*, 170 N. Y. 554; *Albany County Savings Bank v. McCarty*, 149 id. 71.

I therefore hold and decide that said mortgage for \$1,800 is no part of the estate of the deceased, and that the accounting party is not chargeable with the amount of the same, nor with any part thereof.

In regard to the second objection: It appears that in 1887, Van De Walker deeded to Caroline S. Percival seven acres of land for \$755; that in 1889 Smith deeded to Wm. G. Percival about three and one-quarter acres of land for \$155. On February 18, 1907, by a joint deed, said Percivals, husband

and wife, conveyed both of said parcels of land to Jennie A. Waful for \$1,000, all of which sum said grantee paid to Wm. G. Percival and he deposited at least \$1,000 thereof to his own credit. September 30, 1909, he died, and on December 14, 1909, his wife died. There had been no settlement between them. Florence A. West is executrix of her deceased father's will, and her husband, Isaac D. West, is executor of her deceased mother's will. A settlement was had between said representatives. The Wm. G. Percival estate paid to the Caroline S. Percival estate the sum of \$1,024. Computing the interest upon Mrs. Percival's share of the proceeds of the sale of her share of the land sold to Mrs. Waful from the date of the payments as shown by the exhibits, and assuming that Percival collected his proportionate share first, we find the interest to be \$116.39. The executrix consents that the claim be reduced to \$961.39, and that her account be surcharged with \$62.61.

The executrix's version of this whole transaction seems sufficiently supported by evidence. The contestants have utterly failed to bear the burden cast upon them by law, to establish their contention that this item is not a just claim against the estate in the amount of \$961.39.

When a representative of an estate on final accounting produces vouchers for sums paid out by him for which he seeks credit in his account, and which account is sworn to, the burden is cast upon the contestants to show that the items paid by the representative, and represented by the vouchers, were not just debts or claims against the estate. *Matter of Sprague*, 40 App. Div. 615; *affd.*, 162 N. Y. 616.

The item of the executrix's account herein is allowed at \$961.39, and her account is surcharged with \$62.61, being the difference between \$1,024 paid by her and \$961.39 the amount which she should have paid.

The third objection deals with the item of \$112 paid to Or-

metta Percival for alleged nursing of the decedent's widow during the quarantine period of forty days.

Section 204 of the Real Property Law provides:

"A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband."

The facts show that said Ormetta Percival in response to a telephone call left Syracuse for Camden to nurse Wm. G. Percival, deceased, but found him dead on her arrival. She is an unlicensed nurse and the wife of a nephew of deceased, and testified, without objection, that after the funeral she stayed at the request of the widow who was up and around the house each day, part of the time, and took her meals at the table excepting that some mornings toast, a cereal and sometimes an egg were taken to her. The widow and nurse were the only persons in the house and they slept in adjoining rooms. Some medicine was given to the widow who was about seventy years old.

The executrix, herein, and sole legatee of the widow, testified that the doctor said that "There wasn't a diseased organ about her, and that she was carrying a burden that she didn't dare reveal. She knew there had been some crooked work done and broke down under it."

The doctor called once during the first week the nurse was there. At the close of the quarantine period the nurse was dismissed, and the widow went to the home of her daughter Florence.

The families of the two sisters are very hostile.

It seems quite plain to me that the statute has been invoked to reduce the residuum of a hostile branch of the family rather than to provide a needed "reasonable sustenance" for the

widow. This hostility was seemingly shared by the widow as she left her estate of about \$1,600 to one of her two daughters, Florence, at whose house she died. As far as the evidence shows, no nurse was provided for the widow after the expiration of the quarantine period, nor was any doctor sworn as to her physical condition.

A widow who hasn't "a diseased organ about her" and whose only ailment was the knowledge that "there had been some crooked work done" and who was about the house daily and able to eat toast, cereals and eggs, is not entitled under a fair construction of the statute, to a nurse as a part of "her reasonable sustenance."

The item of \$112 paid to Ormetta Percival is disallowed and the account of the executor is surcharged with the same and interest thereon at three and one-half per cent from July 25, 1910, the date of payment.

The executrix paid her attorneys \$467.54 for services. This amount was involved in the objections, and one of the attorneys testified to the amount of work done and its value. The contestants offered no evidence against the bill. On the record, and in view of the size of the estate, I deem the amount paid reasonable and allow the same in full.

During the trial the West note in amount of \$50 not included in the account was paid. The note was without interest. It should have been collected and the money put at interest. The account of the executrix is surcharged with the sum of \$50 and interest thereon, at three and one-half per cent. from May 31, 1911, one year after the executrix's appointment.

There is another feature of this case to be considered which deals with the question as to whether certain provisions in the will of the deceased were adeemed by a transfer of real estate.

January 19, 1899, the deceased, William G. Percival, made his will which was probated May 31, 1910, by which he left the

life use of one-half of all of his property, real and personal to his wife, Caroline S. Percival; he gave a legacy of \$2,000 to his granddaughter, Grace Timian Mann. To his daughters, Florence A. West and Louise A. Timian, he left the life use of an undivided one-half of his estate. He provided that upon the death of said wife all of the property of which she had a life use should go absolutely to his grandson, Clayton A. Timian; and that upon the death of either of said daughters the share of the one so dying should go to the heirs of her body, share and share alike; if she left no surviving heir or heirs, her share was given to said grandson, Clayton A. Timian, absolutely.

Thereafter the deceased gave to his daughter Florence A. West a mortgage which he held on her home, on which there was due about a thousand dollars; on February 20, 1907, he deeded to his other daughter, Louise A. Timian, a block in Camden, N. Y., valued at \$3,500; on February 4, 1907, he deeded to said Clayton A. Timian the "Shirt Factory," so called, in Camden, N. Y., which included the personal property, amounting in all to \$15,000.

The executrix, Florence A. West, contends that the deed to her sister, Louise A. Timian, was given in lieu of her interest in the estate and in ademption thereof, and that the deed to Clayton A. Timian was given in lieu of his interest in the estate and in ademption thereof, and that neither should further share in the estate.

The contestants, the legatees, contend that no facts have been shown upon which an ademption can be based nor from which a presumption of ademption can arise.

The English authorities, and those of other, as well as of our own state, support the proposition that if a father, or one standing *in loco parentis*, gives a legacy to a child, it is understood as a portion, though not so described in the will, and if afterwards, upon marriage or any other occasion calling for it,

he makes an advancement to that child in the nature of a portion, such provision or portion, if of an equal or greater amount than the legacy, certain and contingent, of the same kind with it, and if no other distinct object be pointed out, will be held a complete ademption of the legacy. If less, an ademption *pro tanto*. 13 Am. & Eng. Ency. of Law, 92.

The deceased was not the father of Clayton A. Timian, but it is claimed by the executor that he stood *in loco parentis*. The facts necessary to establish that relation may be proved by extrinsic evidence such as his general conduct towards the child, or by intrinsic evidence from the nature and terms of the gift.

The evidence shows that Clayton A. Timian is the only grandson of the deceased, and that from early childhood the two were companions. While the boy had parents with whom he lived, yet he sought out his grandfather at every opportunity and the grandfather frequently kissed and caressed him and bought him pets. He expressed fear that the boy would not be properly brought up and educated. When old enough to work, he endeavored to procure employment for him in the Water Wheel works, at Camden. He failed in this because of the refusal of the son-in-law, West, to take the boy; West claiming that he hadn't sufficient education, and ought to be sent to school. The deceased then sent him to Cazenovia Seminary.

A close friendship existed between the boy and his grandfather from boyhood to manhood, and a general supervision was exercised by the deceased over the course and conduct of said grandson.

The deceased seemed very anxious to establish his grandson in business. He said to Mr. West, his son-in-law, "I have always promised to put that boy in business, and I am going to do it."

He afterwards built a shirt factory, which he and the boy

ran until he deeded it to him in February, 1907, and the boy is now running it.

From these and other facts not referred to, it seems clear that it was the intention of the deceased to watch over, educate and establish in business his grandson, and for that purpose it was clearly his intention and he did place himself *in loco parentis*.

This relation being established, the question now arises as to what was the intention of the deceased, keeping in mind the provisions of his will when he deeded the shirt factory to his grandson, Timian. Did he intend to adeem in whole or in part the prior testamentary provisions in his favor?

Seven or eight years after the testator made his will in which he provided among other things that, subject to the life use of his widow, his grandson should have one-half of his estate, he built a shirt factory and stocked it, took the grandson into business with him, and afterwards conveyed the factory to him with its contents, which the evidence shows was worth at the time of the conveyance \$15,000.

One witness testified that, at the time of the execution of the deed, the deceased said that he had given the shirt factory to "Clate," meaning his grandson, and that was all that he would get. That was his share. Four or five witnesses testified that subsequently to the execution of the deed the deceased told them he had given the shirt factory to Clate, his grandson, and that was to be his share of the estate, and that was all he would get.

It is urged on behalf of Timian that he is a residuary legatee and the principle of ademption does not apply to such a legacy, and that the testator, having lived two years after the conveyance to Timian without changing the provisions of his will, intended that Timian should have the shirt factory and also should receive all the benefits provided for him in the will.

In support of the first proposition, *Hays v. Hibbard*, 3 Redf. 28, is cited. The learned surrogate in that case in support of his proposition cites 2 Williams on Executors, 1143. The same author at page 1142 says: "It was formerly considered that where the bequest to the child is of a residue or part of a residue, that subsequent advance cannot operate as an ademption; because such a gift cannot be considered as a legacy of a portion, which must mean a legacy of a definite sum. But a contrary doctrine is now established." *Allen v. Allen*, 13 S. C. 512; 36 Am. Rep. 716.

Authorities are of little use, except as a general guide upon the subject of the controlling principles of law, as each case must rest on its own facts. The whole question is one of intention. *Langdon v. Astor's Executors*, 16 N. Y. 9.

"In the matter of ademption of legacies, whether the advance made was intended as an ademption or not, can only be gathered from the circumstances surrounding each individual case; for which purpose parol evidence may be adduced." *Wallace v. Du Bois*, 65 Md. 153.

It is contended by Timian that declarations of a testator cannot be proven to establish his intention of redeeming a legacy by means of subsequent advances to the legatee, except where they are made at the time of making the advances and with a view of giving character to the transaction, citing *De Groff v. Terpenning*, 14 Hun, 301. In that case the evidence was taken under objections. In this case the witness, Morss, without objection, testified that, at the time of the execution of the deed, the deceased stated in substance that the shirt factory was all that Timian was to have out of his estate, and several witnesses testified to kindred subsequent declarations. "The declarations of the testator, whether made in the legatee's presence or not, are competent evidence to prove an ademption." *Van Houten v. Post*, 32 N. J. Eq. (5 Stew.) 709.

Where declarations of a testator are received without objection and without motion to strike out the testimony, there is no principle of law which demands that they should be disregarded; being in the case they constitute a material part of the record and it is the duty of a court or jury, as the case may be, to consider them. *Ganson v. Tift*, 71 N. Y. 52.

It is entirely clear that a party who has sat by during the reception of improper evidence without properly objecting thereto, and has taken his chance of advantage to be derived therefrom, has not, when he finds such evidence prejudicial, a legal right to have the same stricken out. *Matter of Morgan*, 104 N. Y. 74. The failure to object to evidence of declarations of deceased so distinguishes this case from the *DeGroff* case, *supra*, that it has no application as an authority upon the question under consideration.

Phillips v. McCombs, 53 N. Y. 494, and *Reynolds v. Robinson*, 82 id. 104, are not in point. It was sought, under objection, to prove the declarations of the testator, made to the scrivener, at the time the will was drawn, for the purpose of showing the intention of the testator. The will, if clear, is the best evidence of such intention. It would be error to receive such declarations in the face of a proper objection. In the case at bar the declarations were received without objection and upon the subject of the testator's intent to adeem.

The deceased made his will in 1899, and made no change by transfer or otherwise in his estate until May, 1905, at which time he transferred to his daughter Florence a mortgage of \$1,800, which he held against her. February 4, 1907, he conveyed to his grandson, Clayton A. Timian, a shirt factory worth \$15,000; February 19, 1909, he conveyed to his daughter Louise A. Timian a brick block, so called, worth \$3,500. The inventory filed by the executor showed an estate of \$14,167.74. The testator died in 1910. All of these transfers were to bene-

ficiaries named in the will, so that at the time that deceased began to transfer his property his estate totaled about \$32,667.74.

If the deed of the shirt factory had not been given, Timian would have his value under the first and fourth paragraphs of the will, provided he survived the testator's widow. But the testator was determined to establish Timian in business and, to make sure of it, he deeded him the factory. It is urged by the executor that the testator having declared at the time of, and several times subsequent to the giving of the deed to Timian, that that was all he would get, intended thereby to adeem the residuary provision of his will, as well as the first and fourth paragraphs.

The answer is that: "The declarations of a testator can never be resorted to for the purpose of contradicting, or even explaining, the intentions expressed in the will." *Williams v. Freeman*, 83 N. Y. 561; *Reynolds v. Robinson*, 82 id. 104.

No will in writing * * * shall be revoked, or altered, otherwise than by some other will in writing or some writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed, etc. Decedent Estate Law, § 34.

Timian is the only residuary legatee and, if he is eliminated by ademption, then the testator died intestate as to a portion of his estate, a thing never presumed, and never permitted by the courts if any other course is open.

"There is always a presumption that the testator did not contemplate intestacy, and a construction that will result in even partial intestacy is not to be adopted if a different construction is permissible." *Matter of Miner*, 146 N. Y. 121; *Johnson v. Brasington*, 156 id. 181; *Matter of Hammond*, 74 App. Div. 547.

On all questions of intent, the testator is a proper subject for consideration. He lived in the village of Camden, N. Y., farmed

it, dealt in real estate advantageously, made money and safely invested it. The inventory shows nine real estate mortgages, six promissory notes, \$500 in United States bonds and two land contracts, and \$1,569.59 in three different banks, aggregating, with the widow's provisions out, \$14,167.74, all at interest, and so securely and wisely invested that the estate sustained a loss of only \$200. Such a man presumably comprehended the nature and extent of his property, and had well in mind the objects of his bounty and fully grasped the contents of his will and the force of its provisions. So far as the record shows his love for his grandson continued to the day of his death. He trusted him with the combination of his safe and he was the only one who could open it after the testator's death.

On what theory, then, can it be held that the testator intended, when he gave the deed to Timian, to provide less for him than he had given by will? If the shirt factory had not been deeded away and Timian took under the provisions of the will alone, he would ultimately secure, if he survived his aunt and mother, approximately \$25,000, or about three-fourths of the entire estate. Did the testator by giving him said deed intend that he should have less than the will provided? I think not.

The testator knew when he gave the deed to Timian that his net estate was about \$30,000. He did not intend by giving that deed to lessen the half of his estate which the will gave to his two daughters for life, as there is no apparent reason therefor.

In *Benjamin v. Dimmick*, 4 Redf. 7, the court said: "The provision by the will is presumed to be a portion, because it is a provision from a parent for his child, and the subsequent gift of a portion is presumed to be a satisfaction of such portion given by the will, either wholly or in part."

To give more or less to a child than the will provides, except upon the clearest proof of intent on the part of the testator, to add to or cut down the provisions of his will, would be, in effect,

to rewrite portions of the will, never permissible when the meaning is apparent.

I therefore hold and decide that the deceased, William G. Percival, when he deeded the shirt factory to Timian intended said transfer to be an ademption of the testamentary provisions to Timian set out in the first and fourth paragraphs of his will, and did not intend to adeem the residuary provisions of his will, or any part thereof. This view leaves the will intact and gives Timian the amount he would have had under the first and fourth paragraphs of the will, as near as it can be figured, had the testator died with the shirt factory a part of his estate.

Throw out the proven declarations of the testator as regards his intentions in giving the deed to Timian, and still by virtue of the relation of the testator and Timian, the testator standing *in loco parentis*, the law presumes that the testator intended to extinguish the provisions of the will in Timian's favor to the extent of the advancement made. This doctrine proceeds upon the theory that a bequest to a child is intended as a full portion of the estate and that an advance in the lifetime of the testator is a part of said portion, delivered in advance and is deemed to be an ademption *pro tanto* of the legacy or portion secured to the child by the provisions of the will. *Lawrence v. Lindsay*, 68 N. Y. 109.

There is another doctrine, that of presumed satisfaction. For instance, where a parent or other person *in loco parentis* bequeaths a legacy to a child or grandchild, and afterwards in his lifetime gives a portion or makes a provision for the same person, without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy. *Langdon v. Astor's Executors*, 16 N. Y. 9, and cases cited.

The remaining question to be decided deals with the fifth paragraph of the will which gives Florence A. West and Louise A. Timian a life use of one-half of the estate of the deceased.

The testator in his lifetime, and about two years before he died, and after the making of his will, deeded to said Louise A. Timian, one of his daughters, a block in Camden, which the evidence shows was worth \$3,500. Two witnesses testified, without objection, that, subsequently to the delivery of the deed, the deceased stated that "that was all Louise was to have," or that in substance. Amanda Seifert testified: "They (meaning the Timians) have got their home. I gave them what I thought was right, and that is all they get; and the rest of the property will go to your aunt, Caroline, and Florence." Witness West testified that the deceased said to him: "I have given to Louise the block and the dwelling house on Washington street, and that is her share."

The executor insists that, upon this evidence and the legal presumptions that arise by virtue of the relation of parent and child, it was the intention of the deceased when he conveyed the block to his daughter, that she should not further share in his estate.

The amount shows in the hands of the executor \$12,490.90 in cash and good securities, out of which must be deducted \$2,000, a legacy to Grace Timian Mann, leaving \$10,490.90, which if divided between the two daughters, Florence and Louise, as provided by the will, each would have the life use of \$5,245.45, subject to the commissions of the executrix and the expenses of this accounting.

The portion which under the provisions of the will would go to Louise A. Timian is in excess in amount of the value of the block conveyed by the deceased to said Louise A. Timian. Did the deceased, when he conveyed the block really intend to give Louise less in value than he had provided for her in his will? If she would sell the block for \$3,500, put the money at interest, she would only have an income from it at six per cent, which is \$210, whereas, if she had the portion provided for her in the will

at the same rate of interest, it would net her \$314.73, making a difference against her of \$104.73. Should it then be held that the conveyance of the block to her was an ademption of her entire interest under the will?

The rules laid down and authorities cited in considering the conveyance to Timian apply to the question here involved. We are dealing here with a father and daughter and with no proof in the case that the father's feelings towards the daughter had changed at any time subsequent to the making of his will.

I find no case where the question of an ademption with a life use provision of a will has been involved. I see no good reason for not applying ademption in case of a residuum or a life use where the amount of the residue or the amount of the life use can be definitely ascertained as in this case. Here the life use is a definite amount and I hold and decide that the deceased, when he gave the deed of the block to his daughter Louise, intended to advance her out of the life use the value of the block, \$3,500; in other words he intended to give her a portion in advance of what she would ultimately have under his will; and he intended that the \$3,500 should be taken out of the one-fourth of his estate, the life use of which he had given her, and that she should have the life use of the difference between \$3,500 and the amount of the net one-quarter of his estate.

Unless this view prevails, a gross inequality will be forced upon Florence, one of the two daughters of the deceased, which was never intended by the testator. His feelings for both of his daughters were the same, so far as the record discloses. Independent of his declarations, if they should be held insufficient to establish his intention to adeem, I maintain that the presumption to adeem arises from the very relation of the parties.

As we have seen in *Langdon v. Astor's Executors*, *supra*, the question of ademption is always one of intention and, when that intention is once established, we are unable to perceive any good

reason why, where the proof shows an intention to adeem, or where that presumption arises by reason of the relationship of the parties, not only a pecuniary legacy, but also an interest in the residue, or in a life use, such intention should not be allowed full effect. In *Allen v. Allen*, 36 Am. Rep. 716, a well reasoned case, the court said: "We have not been able to find any case in which an interest in the residue has been held to be adeemed by a subsequent advance, but we do find that in the case of *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131, upon a full review of the authorities, it was held that a bequest of a residue, will, according to its amount, be a satisfaction of a portion, either in full or *pro tanto*, as the case may be, and it is difficult to understand how, upon the same principle, we can avoid holding that a portion by settlement or otherwise shall in like manner be a satisfaction of a previous bequest of a residue to the extent that the former may cover the latter."

So that no seeming injustice may be done by a parent to his children, where no reason for favoritism is shown, I hold and decide that where the evidence shows such to be the intention, a life use, where the amount of the same is ascertainable and definite, may be adeemed either in whole or in part by an advance made subsequently to the date of the execution of the will, either in money, or an equivalent, the value of which can be definitely fixed.

This decision gives full force and effect to all the provisions of the will, and leaves the children of the testator and his grandson, notwithstanding the advancements, in the same financial condition that they would have been in, had the advancements not been made, and had they each taken under the provisions of the will. If this decision violates any rule of law, it has the advantage of being pregnant with the oil of equity.

In dealing with the affairs of a family, one ounce of equity is worth a ton of dynamite.

Decreed accordingly.

**Matter of the Appraisement Under the Transfer Tax Act of
the Property of CATHERINE E. DALY, Deceased.**

(Surrogate's Court, New York County, February, 1913.)

**TAXES—TRANSFER TAX—WILLS—EXEMPTION FROM PAYMENT OF TRANSFER
TAX—LAWS 1912, CH. 206.**

A bequest to the American Society for the Prevention of Cruelty to Animals, under the will of a decedent who died in 1911, is subject to a transfer tax.*

APPEAL by the state comptroller from an order assessing the transfer tax.

Thomas E. Rush, for State Comptroller.

J. Mayhew Wainwright, for American Society for the Prevention of Cruelty to Animals.

COHALAN, S.—The state comptroller appeals from the order assessing a tax upon the decedent's estate and alleges that the appraiser erred in exempting from taxation a bequest of money to the American Society for the Prevention of Cruelty to Animals. Decedent died on the 17th of April, 1911. The Tax Law in force at that time provided that a bequest to an educational, charitable or benevolent corporation was exempt from the provisions of the act. It also provided that a bequest of personal property other than money or securities to a society organized "for the enforcement of laws relating to children or

* See Laws of 1912, chap. 206, which exempts societies for the protection of children or animals from the payment of a transfer tax on bequests to them.—[REPR.

animals" was exempt from taxation. The state comptroller contends that the American Society for the Prevention of Cruelty to Animals is a corporation organized exclusively for the purpose indicated by its title, while the learned counsel for the society contends that it is an educational, charitable and benevolent corporation. The act of incorporation of the society, as well as the by-laws passed pursuant thereto, shows that the society was formed to "enforce all laws which are now or may hereafter be enacted for the protection of dumb animals, and to secure by lawful means the arrest, conviction and punishment of all persons violating such laws; to provide effective means for the prevention of cruelty to animals throughout the United States, and to instruct the people to be kind to animals by the dissemination of humane literature and other effective methods." Its so-called educational work seems to be confined to the enforcement of laws enacted for the prevention of cruelty to animals, and to the publication of leaflets and tracts that appeal to mankind for humane treatment of animals. The enforcement of special laws can be considered educational only in the limited sense in which every experience of the individual may, by increasing his knowledge, be educational. It is not educational in the usual meaning of the word. There was no proof before the appraiser of the extent to which leaflets and tracts are disseminated or whether such leaflets contain any matter of instruction other than an exhortation to refrain from cruelty to animals. It would therefore appear that the work which the society accomplishes cannot be designated as educational within the meaning of the term in section 221 of the Tax Law. The learned counsel for the society also contends that the society is a benevolent and charitable corporation. Under the act of incorporation it is entitled to receive one-half of all the fines imposed upon persons convicted of violating the provisions of law relating to the prevention of cruelty to animals. The papers

before the court do not show what amount is realized by the society from this source or whether it is sufficient to meet all the necessary expenses of the society. But, assuming that the amount received from fines is inconsiderable in comparison with the amount expended by the society, and that the voluntary contributions of the humane and the philanthropic constitute its principle source of income, I am still unable to perceive how the society can properly be designated as benevolent or charitable. It is an elementary rule of statutory construction that the words of a statute are to be given their usual, ordinary meaning. *McCluskey v. Cromwell*, 11 N. Y. 593; *Matter of O'Neil*, 91 id. 516. The usual acceptance of the words "benevolent" and "charitable" is limited to those disinterested actions by which human beings confer benefits upon other members of the human family. It does not extend to the considerate and thoughtful treatment of animals by man. The latter may result from a benevolent spirit or charitable disposition, but the word which is ordinarily used to describe the considerate or thoughtful treatment of animals is not benevolent or charitable, but humane. While fully appreciating the valuable services which the society renders and the admirable work which it performs, I am constrained to hold that it is not an educational, charitable or benevolent corporation within the meaning of those terms in section 221 of the transfer tax statute. The remedy for the statutory discrimination against corporations similar to the Society for the Prevention of Cruelty to Animals lies with the legislature and not with courts. In *Matter of Moses*, 138 App. Div. 525, the court held that the Brooklyn Society for the Prevention of Cruelty to Children was not entitled to exemption from taxation on a bequest of money or securities. This decision I consider controlling upon the matter under consideration. The order fixing tax will be reversed and the appraiser's report remitted to him for the pur-

pose of including in the taxable assets of decedent's estate the bequest to the American Society for the Prevention of Cruelty to Animals.

Order reversed and appraiser's report remitted.

**Matter of The Appraisal Under the Transfer Tax Acts of the
Property of SAMUEL ROEBUCK, deceased.**

(Surrogate's Court, Kings County, February, 1913.)

TAXES—TRANSFER TAX—"LINEAL DESCENDANTS"—ILLEGITIMATE CHILDREN.

The children of a decedent's illegitimate daughter, though born in lawful wedlock, are not his "lineal descendants," and legacies to said children are taxable at the rate of five per cent.

APPEAL from an order assessing and fixing the transfer tax.

Seldon Bacon and Leonard B. Smith, for appellants.

Harry Howard Dale (James W. Redmond, of counsel), for state comptroller.

KETCHAM, S.—Question is made as to the rate of taxation upon legacies to children of the decedent's illegitimate daughter who themselves were born in lawful wedlock.

The order appealed from is right, unless these children of the daughter are lineal descendants of the decedent under the provision which prescribes one *per centum* as the rate of taxation upon transfers to "any lineal descendant of such decedent * * * born in lawful wedlock." Tax Law, § 221.

"A lineal descendant is one who is in the line of descent from a certain person." But the line of descent is not merely derived from the communication of blood by animal generation. "The line of descent is the course that property takes according to law when the owner dies." *Matter of Beach*, 154 N. Y. 242; *Matter of Cook*, 187 id. 253, 261.

These cases forbid the argument, made in behalf of the legatees, that the words "lineal descendants" in the statute cited *supra* are not used in their legal and technical sense. Under these authorities, there is no line of descent between the decedent and these legatees and they cannot be his descendants.

The order in this respect, is affirmed.

Order affirmed.

In the Matter of the Judicial Settlement of the Account of
MARIE DELGADO, as Executrix of the Last Will and Testa-
ment of MARGARET GILLESPIE, Deceased.

(Surrogate's Court, Kings County, February, 1913.)

**EXECUTORS AND ADMINISTRATORS—JUDICIAL SETTLEMENT OF ACCOUNTS OF
—JURISDICTION OF SURROGATE—CODE CIV. PRO. § 2472a.**

Where a will became effective because of the promise of the executrix and sole legatee, who was a sister of testatrix, that she would turn over to another sister a portion of the estate, the executrix, as such, is bound by the constructive trust raised by her promise which involved her duty and conduct in both relations, and upon the judicial settlement of her accounts the surrogate, under section 2472a of the Code of Civil Procedure, has jurisdiction in the premises.

PROCEEDING upon the judicial settlement of the account of
an executrix.

William W. Butcher, for executrix.

Thomas Kelby, for Mary E. Gillespie.

KETCHAM, S.—The accountant is the executrix and sole legatee. A sister of the testatrix, objecting to the account, alleges that the executrix legatee agreed with the decedent that "if said decedent gave her all her property by said will she (the said petitioner) would turn over to the sister such portion thereof as was then designated as what was right, and, because of said promise, said will became effective." In this quotation from the answer, verbal inaccuracies which are obvious are disregarded.

Upon this allegation, the court is asked to ascertain the amount which will fulfill the accountant's agreement, in order that a trust be impressed for such amount and that it be paid to the objectant.

Upon the motion of the testatrix to dismiss the answer, the question is presented, has the enactment of section 2472a of the Code of Civil Procedure conferred jurisdiction in the premises?

By the section cited the surrogate has jurisdiction "to effect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter."

Assuming the truth of the sister's allegation, the accountant took all her rights in the decedent's estate under an express promise and, therefore, a trust, to turn over to the sister a portion of the estate. This trust was always enforceable in some court against the accountant, at least in her capacity as legatee. But, under a fair reading, the section cited contemplates only a trust by which the accounting party is personally bound. No jurisdiction has been given to effect the accountant with a constructive trust to which she is a stranger.

If she, the accountant, obviously affected not only in her character as legatee but also as executrix? Where the will by which she was made both legatee and executrix became effective because of her promise that she would deliver a portion of the estate to another, did not her promise involve her duty and conduct in both relations?

Suppose that another had been the executor and that such executor participated in the agreement in consideration of which the will was made. Could it then be doubted that the executor, if he should accept office, would be an accountant to be affected by a constructive trust? Is it any less doubtful that when the person bound by the obligation also becomes the executor, he must carry into office all the responsibility with regard to the disposition which in his agreement with the decedent he has promised to assume?

Is it not a fair interpretation of the transaction between the accountant and the testatrix that the former agreed that in every relation which she might thereafter maintain under the will she would pledge her conscience to the fulfillment of her promise?

Assuming the truth of the answer, it would result that the executrix as such received her appointment under the will as well as her legacy upon the faith of her promise, and that she is now, upon her accounting, bound by the constructive trust which the promise raised.

The answer should not be dismissed as upon demurrer but an inquiry as to the facts should be had. The trial may be brought on upon two days' notice.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Hugo C. COLLMAR, as Executor of the Last Will and Testament of ALBERT STRAUB, Deceased.

(Surrogate's Court, Kings County, February, 1913.)

EXECUTORS AND ADMINISTRATORS—COMMISSIONS AND EXPENSES OF—SUPPLEMENTARY PROCEEDINGS.

Where the will of a testator, who died possessed of a bond of his brother, who was his residuary legatee, for \$3,000, secured by a second mortgage, contains general legacies to the amount of \$850, the account of the executor, who after charging himself with said mortgage and interest as so much money in his hands, must be settled according to his statement that he has a balance of \$3,811.12 subject to commissions and expenses of administration.

The claim of said brother's receiver in supplementary proceedings, that he is entitled to receive a part of the residuary legacy, and that the mortgage is a subsisting claim against the residuary legatee and should be enforced for the benefit of the receiver, requires no attention upon the face of the executor's account.

Where after the death of testator his brother gave a third mortgage on the same lands with an agreement that the second mortgage had been merged in the fee, that he would obtain a satisfaction thereof from the executor, and that the third mortgage should be a superior lien to the second mortgage, the third mortgagee has no standing to intervene and ask that her claim be ascertained and decreed superior to the claim of the said receiver.

Until the mortgage for \$3,000, without the aid of which the legacies and charges against the estate cannot be paid, is converted into cash and the actual balance of the estate is substituted for the balance as stated in the account, the rights of the receiver and the holder of the third mortgage do not require determination; and the surrogate will not advise the executor with regard to the disposal of the mortgage for \$3,000.

PROCEEDING upon the judicial settlement of the account of an executor.

Gustavus S. Smith, for executor.

Gross & Surpless, for M. Shaler Allen, as receiver of John G. Straub.

George Tiffany, for Jane McAllis Barwood.

Watson & Kristeller, for Marian Hand.

D. Ray McDonald, for Louise Eitel.

KETCHAM, S.—The decedent died possessed of a bond of his brother for \$3,000, secured by a second mortgage. The brother is the residuary legatee and the will contains general legacies to the amount of \$850.

The executor states the balance of his account, subject to commissions and expenses of administration, at \$3,812.11. This sum is reached after charging himself with \$3,035.50, on account of the mortgage last mentioned.

In proceedings supplementary to execution against the residuary legatee a receiver of his property was appointed, who now not only claims to be entitled to receive a portion of the residuary legacy, but insists that the mortgage is a subsisting claim against the residuary legatee and should be enforced for the benefit of the receiver.

But since the decedent's death, the residuary legatee has delivered a third mortgage upon the same lands; and has accompanied it with an agreement that the second mortgage has merged in the fee of the lands, that he will obtain from the executor a satisfaction thereof and that the lien of the third mortgage shall be superior to the lien of the second mortgage.

In reliance upon this arrangement, the holder of the third mortgage seeks to intervene, asking that her claim be ascer-

tained and decreed to be superior to the claims of the receiver.

Plainly the holder of this third mortgage has no standing in this proceeding. She is not a party interested in the fund now under examination. She is only the holder of the residuary legatee's obligation. None of the relations or interests which she discloses can be adjudicated in this case. *Duncan v. Guest*, 5 Redf. 440; *Matter of Redfield*, 71 Hun, 344; *Estate of Witte*, N. Y. L. J., Jan. 16, 1913.

The claims of the receiver require no attention upon the face of this account. The executor charges himself with the \$3,000 mortgage, with interest, as so much money in his hands, and his account must be settled according to his statement.

He asks the instruction of the court in regard to the disposal of the mortgage, but the court is not his adviser. He, and not the surrogate, is the responsible officer of the estate.

There is no room for discussion as to whether the executor is justified in accounting for the mortgage and in reducing the same to the needs of his administration. Without the aid of the mortgage, the legacies and charges of the estate cannot be paid.

Upon the account as made, standing as it does without objection, none of the questions argued requires determination. They cannot arise until the mortgage is converted into cash, and the actual balance of the estate is substituted for the balance now declared.

The decree may, therefore, direct that any party may apply on the foot thereof for proper direction.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of the PEOPLE'S TRUST COMPANY, as one of the Executors of the Estate of WILLIAM C. ROBERTS, Deceased.

(Surrogate's Court, Kings County, February, 1913.)

EVIDENCE—WHEN DISALLOWED—CONFLICT OF—EXECUTORS AND ADMINISTRATORS.

Where the claim of an executor against the estate is based on an alleged assignment of corporate stock, then under pledge to secure a loan to the decedent who died before the stock was to be delivered under the assignment, and one of the two subscribing witnesses thereto swears to its execution and delivery, and the other, who was not present either at the time the paper was signed or delivered, testifies that she signed it after the death of decedent at the request of the claimant; and because of irreconcilable conflict in the evidence no solution can be reached without the recognition of conscious untruth either in the prosecution or defense of the claim, it will be disallowed on the ground that the claimant upon the whole case has not established his right of recovery by clear and convincing testimony.

PROCEEDING upon the judicial settlement of the accounts of an executor.

Wingate & Cullen (T. Ellett Hodgskin), for accounting executor.

James M. Gray, for Robert B. Honeyman, an executor.

Blandy, Mooney & Shipman (Edmund L. Mooney, of counsel), for George S. Hice, as claimant and as executor.

W. H. Albro, for Marietta J. Roberts.

Edward J. Dowling, special guardian.

KETCHAM, S.—One of the executors presents a claim against the estate based upon an alleged assignment to him by the decedent of 250 shares of the stock of a corporation.

The instrument bears the unquestionable signature of the decedent and the equally authentic signatures of two persons apparently signing as witnesses. One of these two persons swears to the execution and delivery of the paper. The other swears that she was not present at any time when the assignment was either signed or delivered and that she signed it after the death of the decedent at the request of the claimant.

The delivery is alleged to have taken place one month before the death of the decedent and at a time when he was in his last illness and was regarded by the claimant as in danger of death.

While in terms the assignment was of present and executed effect, the stock which was the subject thereof was then under pledge to secure a loan to the decedent; the instrument provided for the delivery of the stock in the future and the death of the decedent occurred before the time for the delivery of the stock came.

Many witnesses as to the circumstances surrounding the parties at the time of the transaction alleged give testimony tending, alternatively, to prove and disprove the claim. Evidence as to a declaration of the decedent possibly referring to the existence of the alleged assignment is given by one credible witness.

Profuse proof is made as to the statements, conduct and relations of many of the witnesses, intended to contradict and discredit them. Documentary evidence has been massed for and against the claim. The conflict thus produced is beyond reconciliation. No solution can be reached without the recog-

dition of conscious untruth either in the prosecution or defense of the claim.

It is well settled as to certain claims against the estates of decedents that they must be viewed with caution and must not be allowed except upon clear and convincing proof. *Shakespeare v. Markham*, 72 N. Y. 400; *Hamlin v. Stevens*, 177 id. 39; *Rousseau v. Rouss*, 180 id. 116; *Roberge v. Bonner*, 185 id. 265; *Holt v. Tuite*, 188 id. 17; *Reilly v. Burkemann*, 149 App. Div. 549; *Apthorp v. Thurston*, 153 id. 572.

It has sometimes been said, in cases within this rule, that the claim should be rejected unless established by "the strongest evidence" (*Shakespeare v. Markham*, 72 N. Y. 400, 403); "very satisfactory evidence" (*Van Slooten v. Wheeler*, 140 id. 624, 633); "evidence so strong and clear as to leave no doubt," (*Hamlin v. Stevens*, 177 id. 39, 48); "the clearest and most convincing evidence" (*Rousseau v. Rouss*, 180 id. 116, 120).

Without suggestion that in these statements of the law the superlative is also superfluous, it is enough for the present case to determine whether or not it is to be governed by the rule in any of its forms.

Generally, the declaration of the rule has so absorbed the prominent facts found in the case in which it has been applied that the rule as announced would seem to be restricted to cases in which the same or like facts were reproduced.

Thus, it is laid down that the higher degree of proof is required when the claim is based upon a contract to be enforced after the death of the person against whose estate it is asserted (*Shakespeare v. Markham*, 72 N. Y. 400, 403); as if it made a difference whether the contract was by its terms enforceable after the death or was enforceable at a time which happened to come after the death.

Again, it is intimated that the rule is especially applicable

to parol contracts (*Rousseau v. Rouss*, 180 N. Y. 116, 121); but without permitting the inference that in the case of a written contract, where the whole question of execution and delivery may depend upon oral evidence, no degree of caution is required.

It is suggested that certain contracts "should be in writing and the writing should be produced" (*Hamlin v. Stevens*, 177 N. Y. 39, 50); but this cannot be taken as any intimation that where the delivery of the writing rests in part upon parol evidence there is no room for the operation of the rule of caution and the requirement of clear proof.

The case last cited declares that "if the contract be ever based upon parol evidence it should be given or corroborated in all substantial particulars by disinterested witnesses;" but this is far from denying that the same proof is equally necessary where a written contract is alleged and its delivery and operative value are the subject of conflicting evidence.

It is inconceivable that the definition of this rule in its relation to the circumstances of separate cases was ever intended to exclude from its operation any other set of circumstances which might fall within the scope of the reason which inspires it. The ordinary and obvious grounds for the rule must appear in any class of cases where a claim against an estate is based upon any transaction in which the decedent personally participated and the claim is not advanced until after his death. The dominant reason for the rule is that by the death of one of the parties to the alleged transaction the guardians of his estate lack his testimony.

The requirement of clear and convincing evidence is no qualification of the only rule of decision applicable to the proof of civil cases, viz., that affirmative allegations must be proven by the fair preponderance of evidence. *Roberge v. Bonner*, 185 N. Y. 265, 268. If any nicety be required, the true doctrine must be that, because of the dangers and limitations to which a

cause of action and its defenses are subject when one of the parties whose oath might be influential upon the inquiry is dead, there can be no fair preponderance in favor of the claim unless the evidence in its support be sufficiently clear and convincing to withstand the scrutiny which a rational distrust would provoke.

Under such circumstances there arises a probative suggestion against the demand. This is evidence, and only evidence can overcome it. It should prevail unless it is opposed by a volume of evidence, in excess of that which might have been convincing if the death had not occurred.

Can there be any doubt that the present case is within both the reason and the control of the admonition that the claim should be rejected unless proven by clear and convincing evidence?

The decedent's signature would ordinarily tend to establish execution and delivery of the instrument and under any rule the presumptions arising from the face of the paper and its possession by the claimant must be regarded. But the force of these presumptions yields, at least in part, and the inferences of execution and delivery become merely a feature merging into the mass of evidence when on one hand the claimant specifically asserts that the execution and delivery took place upon a definite occasion and a person appearing as a subscribing witness swears that the only execution and delivery which are asserted never had any existence.

In this condition the question is, Was the paper made and delivered by the decedent in the presence not only of the witness who remains faithful to the claimant, but also of the witness who now disowns the transaction, and was this all done on the single occasion assigned by the claimant?

Not only by the testimony of the witness who swears against the execution of the paper, but by other suggestive evidence,

the issue is forced as to whether, at the particular time in question, certain acts were performed. The proof for or against such acts rests so largely in parol and is so dependent upon the limitations of human truth and memory, that any rule of inquiry ever devised for the protection of estates against claims based upon oral contracts would seem equally applicable where the physical acts and sayings which might constitute the making of a written contract by a person since deceased are the prominent issue.

What could be the distinction which would provoke a measure of caution as to whether the decedent and others did and said such things as might constitute an oral promise but would neglect the same means if the question was whether the decedent and others did and said such things as might constitute the making and delivery of a written contract?

Has the claimant upon the whole case established his right of recovery by clear and convincing evidence?

By this test, the claim is disallowed.

The other claim of the same executor against the estate is allowed at the sum of \$3,001.64, with interest from the 12th day of April, 1910.

Decree should be presented in accordance with the foregoing views.

Decreed accordingly.

**Matter of Revoking Letters of Administration upon the
Estate of AUGUSTO MADALONI, Deceased.**

(Surrogate's Court, Erie County, March, 1913.)

**EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION TO
BROTHER REVOKED—LETTERS OF ADMINISTRATION TO ITALIAN CONSUL
UNDER TREATY WITH UNITED STATES CONTAINING "MOST FAVORED
NATION" CLAUSE.**

Where a subject of the kingdom of Italy dies intestate in this state leaving him surviving a brother, a resident of this state, and his father, a citizen and resident of Italy, letters of administration granted to the brother will be revoked and letters issued to the Italian consul under the Italian treaty with the United States, containing the "Most Favored Nation" clause.

Motion for the revocation of letters of administration.

William H. Gorman (Thomas A. Sullivan, of counsel), for administrator, Lonigi Madaloni.

Horace Lanza, for Italian consul.

HART, S.—Letters of administration in the above estate were granted to Lonigi Madaloni, a resident of this county, and a brother of decedent, upon *ex parte* application. The representative of the Italian counsel asks revocation of the letters, claiming a prior right thereto, decedent's father being a citizen and resident of Italy, which application is resisted, with submission of briefs and references to innumerable decisions and treaties.

The treaty with the Argentine Republic, which contained the clause relating to consuls, consular agents, vice-consuls, etc.,

"shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," left a possible right of discretion with the surrogate to determine priority of right to administration.

In *Rocca v. Thompson*, 223 U. S. 317, the right to local administration was reserved to the public administrator as against the Italian consul, affirming decision of the Supreme Court of California. In the opinion of Mr. Justice Day reference is made to the treaty between the United States and Sweden proclaimed March 20, 1911, but the decision seems to be based on a construction of the Argentine treaty which is not nearly so broad in scope or extension of powers. The treaty of 1878 between the United States and Italy contemplates no power to administer estates vested in the consuls. The treaty with Peru of 1887 provides that in the absence of the legal heirs or representatives the consuls or vice-consuls of either party shall be *ex officio* the executors or administrators of the citizens of their nations who may die within their consular jurisdiction. The treaty between the United States and Sweden of March 20, 1912, gives to the consuls and their subsidiaries the authority "to take charge of the property left by the deceased for the benefit of his lawful heirs and creditors," and, moreover, *have the right to be appointed administrator of such estate*. Under the Italian treaty containing the "Most Favored Nation" clause, the right to administer must be accorded.

I realize this question has been presented to other Surrogates' Courts in this state, particularly in *Matter of Baglieri*, N. Y. L. J., June 11, 1912, and *Matter of Lombardi*, 78 Misc. Rep. 689.

On account of the frequency of applications in this court wherein the consuls of the various countries are involved, it would seem proper and appropriate that some comment or ex-

planation is made other than merely revoking the letters heretofore issued by formal decree. I am of the opinion, however, that the extended powers derived from the Swedish treaty will engender serious dispute among resident next of kin and the authorized representatives of the various countries, and that the best pecuniary results will not always accrue to the non-residents entitled to share in these estates.

In the belief, however, that I have no discretion in the premises, a decree may be submitted revoking the letters of administration heretofore granted to Lonigi Madaloni, and the issuing of letters to the Italian consular agent.

Letters of administration revoked.

**Matter of the Supplementary Appraisal of the Estate of
BURTON S. DUFFEE, Deceased, under the Acts in Relation
to the Taxable Transfers of Property.**

(Surrogate's Court, Wayne County, March, 1913.)

**TAXES—TRANSFER TAX—WHAT ESTATE IS SUBJECT TO TRANSFER TAX—
SAVINGS BANK ACCOUNTS—TAX LAW, § 220 (4).**

Upon the death of a testator who died in October, 1911, one-half of the balance due on joint deposits in bank in the name of himself and wife became transferable as a gift to the wife intended to take effect in possession or enjoyment at or before his death and is subject to a transfer tax under section 220 (4) of the Tax Law, as amended by Laws of 1911, chapter 732.

Where, three years before testator's death, the heading of his savings bank account was changed by the addition of words which enabled his wife to draw the money, the full amount in said bank at his death is also subject to a transfer tax.

**APPEAL from the report of an appraiser in a proceeding for
assessment of transfer tax.**

Durfee & Lines, for executrix.

Frederick E. Converse, for state comptroller.

KNAPP, S.—Burton S. Durfee died on or about the 2d day of October, 1911, in the town of Macedon, this county, leaving a last will and testament which was admitted to probate by the surrogate of this county on the 11th day of December, 1911, and letters testamentary were issued to Elizabeth J. Durfee, the executrix named therein, on the 15th day of January, 1912. A petition was filed in the surrogate's office, asking for the appointment of an appraiser under the acts in relation to the taxable transfers of property. Thereafter, and on the 22d day of April, 1912, a further petition was presented by the executrix, asking for the appointment of an appraiser, and for a supplementary appraisal, on the ground that certain property belonging to the estate had been inadvertently omitted upon the appraisal theretofore had. The supplementary report of the appraiser, who is the county treasurer of the county, shows that the decedent had a deposit in the Mechanics' Savings Bank of Rochester, N. Y., running as follows: "Mechanics' Savings Bank to Burton S. Durfee, Dr." The first entry is October 3, 1896, as of July 1, 1896. On December 1, 1898, the heading was changed by the addition of the words: "Elizabeth J. Durfee may draw." At the time of the death of the testator the balance in said Bank amounted to the sum of \$655.15.

The testator also had an account with the National Bank of Commerce of Rochester, headed "B. S. and E. J. Durfee, either survivor may draw." There was a balance in said bank at the time of the death of the testator amounting to the sum of \$1,-087.77.

The testator also had an account in the Rochester Savings Bank headed, "Elizabeth J. Durfee and Burton S. Durfee," and

there was at the time of the death of the testator a balance in this bank amounting to the sum of \$1,178. 18.

It appeared from the testimony taken before the appraiser that the money deposited in the National Bank of Commerce of Rochester, and in the Rochester Savings Bank, was money belonging partly to the decedent and partly to Elizabeth J. Durfee, and that one-half of each deposit belonged to the decedent, and one-half belonged to Elizabeth J. Durfee.

The appraiser has appraised for the purposes of the transfer tax one-half of the balance in the National Bank of Commerce and in the Rochester Savings Bank, amounting to the sum of \$1,182.98, and the full amount in the Mechanics' Savings Bank, amounting to the sum of \$665.15, amounting in all to the sum of \$1,788.33. From the determination made thereon an appeal has been taken to me, and the question here for determination is, as to whether or not the joint deposits in the banks in the name of husband and wife are taxable upon the death of the husband.

The law relating to taxable transfers, as applicable to this estate, is found in chapter 62 of the Laws of 1909, entitled, "An Act in relation to taxable transfers, constituting chapter 60 of the Consolidated Laws," as amended by chapter 706 of the Laws of 1910, as further amended by chapter 732 of the Laws of 1911.

This statute is not a general statute for the purposes of taxation, but is a special statute, relating to the taxable transfers of property left by decedents. The right to impose this tax must rest upon evidence sufficiently probative in force to bring it within the statute and must establish a case in which the law clearly realizes its imposition. *Matter of Enstron*, 113 N. Y. 174; *Matter of Miller*, 77 App. Div. 473; *Matter of Thorn*, 44 id. 8.

The rule is that a special tax will be construed strictly

against the government and favorably to the taxpayer, and that a citizen cannot be subjected to the special burden without clear warrant of law. *Matter of Miller*, 77 App. Div. 473; *Matter of Vassar*, 127 N. Y. 1; *People v. Union Bag & Paper Co.*, 63 Misc. Rep. 132; *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Wolfe*, 89 App. Div. 349; *Matter of Stewart*, 131 N. Y. 274; *Matter of Swift*, 137 id. 77; *Matter of Harbeck*, 161 id. 211.

The tax has been quite universally held to be one upon the transfer or succession, and not upon property or the estate of the deceased. *Matter of Wolfe*, 89 App. Div. 349; *Matter of Hoffman*, 143 N. Y. 327; *Matter of Baker*, 83 App. Div. 530; *Matter of Dows*, 167 N. Y. 227; *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283; *Matter of Cornell*, 66 App. Div. 162; *Matter of Rogers*, 71 id. 461; *Matter of Miller*, 77 id. 473.

The words of the statute are to be used in their ordinary legal significance. *Matter of Gould*, 156 N. Y. 423.

It may be noted that a careful examination of the statute does not show any express provision regarding the taxation of joint deposits in banks. The law has recognized for many years a tenancy by the entirety, as between husband and wife as to transfers of real estate held in their joint names as such and the right of survivorship exists to the survivor. The leading case upon that subject in this state is *Bertles v. Nunan*, 92 N. Y. 152, and the following cases sustain that proposition: *Matter of Albrecht*, 136 N. Y. 91; *Brown v. Brown*, 79 Hun, 44; *Toole v. Board of Supervisors*, 13 App. Div. 472; *Hiles v. Fisher*, 144 N. Y. 306; *Zornlein v. Bram*, 100 id. 13.

The reason for this rule was that the common law rule provided that when land was conveyed to husband and wife they did not take as tenants in common or at joint tenants, but each became seized of the entirety, and that upon the death of either

the whole survived to the other, and that rule has not been changed by the acts enlarging the rights of married women.

While the law does not recognize tenants by the entirety in personal property (*Matter of Albrecht*, 136 N. Y. 91) it still does recognize a joint tenancy in personal property which may be created if the parties so intended, irrespective of whether the tenants be husband and wife, and in such a case the right of the survivor does exist. *Matter of Kaupper*, 141 App. Div. 54; *West v. McCullough*, 123 id. 846.

In the case of *Augsbury v. Shurtliff*, 180 N. Y. 138, Judge Vann, writing, says: "A contract by which each of two owners of a fund, as tenants in common, transfers his interest therein to the other if he survives him, is supported by a good consideration, and I see no reason why the intention of the parties should not be enforced by the courts. While such an agreement cannot be performed until after the death of one of the parties, it is complete and irrevocable, for neither can withdraw therefrom without the consent of the other. It is not testamentary in character, because it is founded on a valuable consideration and is not subject to revocation. It is as absolute as a deed, 'which is to take effect so as to pass the title at' the death of the grantor."

It may be said in regard to the case above cited that the joint contract between the two parties interested in the bank account had been signed to be delivered to the bank, and the question at issue was as to whether or not this contract had been presented to the bank before the death of one of the parties. In the case at bar the evidence does not show how or under what circumstances the changing of the bank books in the bank was made, or by whose direction.

In the case of *Kelly v. Beers*, 194 N. Y. 49, Judge Hiscock, in writing the opinion of the court in regard to the bank accounts standing in the name of the two survivors, says: "It

has been written, however, in various decisions that the mere form of the account in such a case as this will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another or to give to such another joint interest in or ownership of the deposit."

In other words, that the mere fact of an account standing in the names of two parties, with the right to each to draw, does not, in and of itself, show such an intention to make a gift as will permit the survivor to take the fund without some proof as to the circumstances connected with the making of the deposits, or otherwise.

The same doctrine was held in the case of *Matter of Bolin*, 136 N. Y. 117. In that case the decedent had deposited a certain amount of money in a bank in her own name. Subsequently she redeposited this money in an account entitled, "Julia Cody, or daughter, Bridget Bolin." Upon the death of Mrs. Cody the question arose as to whether Bridget Bolin was entitled to this fund by right of survivorship. Bridget Bolin was her daughter. Judge Gray, in writing the opinion of the court, says: "There were no words of gift and the receipt and holding of the pass book were consistent with the mere custody, or agency. The law never presumes a gift. To constitute a valid gift there must have been the intent to give and a delivery of the thing. The evidence must show that the donor intended to divest herself of the possession of her property and it should be inconsistent with any other intention or purpose."

A different rule seems to apply, however, as between husband and wife and a full examination of the authorities will be found in the opinion of Judge Miller in the case of *West v. McCullough*, 123 App. Div. 846, which case was affirmed in 194 N. Y. 518. See also *McElroy v. National Savings Bank*, 8 App. Div. 46; *Moore v. Fingar*, 131 id. 399; *Sanford v. Sanford*, 45 N. Y. 723; *Matter of Meehan*, 59 App. Div. 156;

Borst v. Spelman, 4 N. Y. 284; Fowler v. Butterly, 78 id. 68; Matter of Eysel, 65 Misc. Rep. 432; Matter of Rapelje, 66 id. 414.

The evidence presented to the appraiser does not show a gift *causa mortis*, nor does it show a completed gift *inter vivos*, within the rule laid down in Beaver v. Beaver, 117 N. Y. 421.

Whatever this transaction may be called, whether it was an uncompleted gift in the nature of a trust or a joint tenancy, the fact still stands out that it was the evident intent and purpose of both the husband and his wife, and it appears by the testimony, that the accounts in these savings banks should be for the common use of both—he put his money in the accounts, and she put in hers. Either party could have destroyed the condition at any time by drawing out the whole fund or any part of it. It is also evident that it was the intention of this husband and wife that, upon the death of one, the survivor without legal formalities should come into immediate, absolute and sole possession of what remained. During their joint lives neither one had sole and absolute possession of these funds; they had the right to reduce to possession and that only. The possession was joint. The right to reduce was several. It was revocable. It became irrevocable at the death of one, and the right to reduce to possession in the lifetime of both resolved into the absolute and sole possession of the balance remaining at the death of one. Prior to the time of the death of either it might be subject to the rights of the creditors. Beakes Dairy Co. v. Berns, 128 App. Div. 137.

Having in mind the limitations upon the enforcement of this statute, which I have discussed, still it seems to me the plain meaning and import of subdivision 4 of section 220 of the law relating to taxable transfers, as amended by chapter 732 of the Laws of 1911, was intended to and does include exactly

such a situation as is here presented. That subdivision reads as follows: "When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state made by a non-resident, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

It seems to me that so much of these deposits as was the property of the decedent became transferable at his death as a gift to his wife intended to take effect in possession or enjoyment at or after his death. If I am right in that conclusion then the share to which the decedent was entitled of these moneys at his death was taxable.

The determination appealed from must be affirmed and an order to that effect may be entered,

Determination affirmed.

Matter of the Estate of LEWIS B. VAN DE WALKER, Deceased.

(Surrogate's Court, Oneida County, March, 1913.)

DECEDENTS' ESTATES—SALE OF REAL ESTATE FOR THE PAYMENT OF LEGACIES—POWER OF SALE UNDER WILL—EXECUTORS AND ADMINISTRATORS—WILLS—LIFE ESTATES—WHAT AMOUNT PAYABLE FOR REASONABLE BURIAL EXPENSES OF DECEDENT.

Where, in the absence of personal property, a sale of testator's real estate was necessary to create a fund for the payment of legacies, it is the duty of the administrator with the will annexed, upon selling decedent's real estate under a power contained in the will, to bring the proceeds intact into court and after citing the legatees, next of kin and creditors of testator, if any, distribute such proceeds in accordance with the surrogate's decree.

Where, from the proceeds of sale, the administrator, without the consent of a daughter of testator, a devisee and legatee under his will, voluntarily satisfies a judgment against her on the theory that it was a lien on her interest in the real estate, his accounts will be surcharged with the amount paid in satisfaction of said judgment, with interest from the time of payment.

Where a husband dies, knowingly leaving an indigent widow, and a will by the provisions of which he gives her a life estate in all his property with provision that "if at any time the income of same is insufficient for her support, then she is to have as much of the principal, each year, as is necessary for her maintenance, including the income, as aforesaid," he intended that her reasonable burial expenses should be paid from his estate, and the administrator will be allowed the amount thereof.

Proceeding upon the judicial settlement of the account of an administrator with the will annexed.

E. & F. E. Lewis, for administrator with will annexed, accounting party.

Henry F. & James Coupe, for James F. Van De Walker and Ada Morgan.

SEXTON, S.—On July 9, 1912, John B. Van De Walker, as administrator with the will annexed, accounted in this court for \$3,800, the proceeds of certain real estate which he sold under a power of sale contained in the will of the deceased.

The following items in the account were objected to by the legatees, Ada Morgan (formerly Ada Van De Walker) and James F. Van De Walker.

1. "Paid Harriet C. Jones, to satisfy a judgment held by her against Ada Morgan, a daughter of decedent, and devisee and legatee named in his will to clear the title of the premises sold by me, owned by decedent at the time of his death, \$513.52."

2. "J. B. Wiggins, funeral charges for burial of Maria Van De Walker, widow of decedent, \$150.00."

3. "Rents received by me from said estate, \$90.73."

The will gave the widow the life use of the real estate and personal property with the right to use it all for her support, and further provided:

"At the death of my wife I give and bequeath what is left of my said property as follows, viz.:

"1,000, to my daughter Hattie Jones.

"\$1,000, to my daughter Ada Van De Walker (now Ada Morgan).

"\$1,000, to my son, John B. Van De Walker.

"The rest and residue I give and devise to my son James F. Van De Walker and to my daughter Mary Ferris, share and share alike."

Two executors were appointed and empowered "to sell my real estate if necessary to carry out the provisions of my will."

This is an accounting after the death of the life tenant.

The first objection deals with a judgment in favor of the legatee Hattie C. Jones against the legatee Ada Van De Walker (now Ada Morgan), which judgment was on July 3, 1911, paid by the administrator to said Jones, without the consent of said Morgan, upon the sole theory that said Morgan was a devisee under the will, and that the judgment was a lien upon her interest in the real estate; hence good title could not be given to the purchaser without the payment of said judgment. So far as the record shows, the payment of the judgment was a voluntary act upon the part of the administrator, as no proceedings of any kind had been taken to force payment or collect the judgment, or restrain the representative from paying the amount of the legacy to the legatee Ada Morgan.

There being no personal property a sale of the real estate was necessary to create a fund out of which the legacies could be paid.

It is probably true that within the case of *Underwood v. Curtis*, 127 N. Y. 523, the real property did not actually become converted into personalty until it was sold, and there was no way that the legatee Morgan could get her share until the property was sold. It is clear that Ada Van De Walker (now Ada Morgan) did not take any of the real estate as heir, and has no title to it as such; hence a judgment against her would not be a lien thereon. *Sayles v. Best*, 20 N. Y. Supp. 951.

Suppose the title to the real estate vested in the heirs, of whom Ada Morgan was one, still that title was subject to the power of sale, and was divested by its execution. *Blanchard v. Blanchard*, 4 Hun, 289; *Hetzell v. Barber*, 6 id. 534; *Germond v. Jones*, 2 Hill, 569.

There was no occasion for any sale, except for the payment of legacies, and to the extent of the legacies, the power of sale having been exercised, the land was legally converted into personalty. *Matter of Weinstein*, 43 Misc. Rep. 577.

It is the duty of the representative of the estate to pay out the proceeds of the sale of the real property, pursuant to the directions and wishes of the testator, as set forth in his will. *Matter of Barandon*, 41 Misc. Rep. 380.

In this case the representative owed no active duty to the judgment creditor of Ada Morgan beyond that involved in the faithful administration of his trust. There is no law which authorized or empowered him to pay the judgment in question out of the moneys in his hands. His duty was to bring the fund intact into court and after citing the legatees, next of kin and creditors of the testator, if any, distribute it in accordance with the surrogate's decree.

Section 2472a of the Code to which my attention is called has no application. The debt there referred to which may be set off against a legacy is a debt in favor of the estate against a legatee and not a debt or judgment in favor of one legatee against another legatee.

It was the duty of said judgment creditor of Ada Morgan to take such proceedings as might be necessary to establish her lien, or protect her rights. A receiver in supplementary proceedings is one of the remedies which suggests itself. The administrator not having been restrained in any way, it was his duty to pay the legacy as directed by the will to Ada Morgan, or to bring the fund into court to be distributed as provided by the surrogate's decree.

His contention that it was necessary for him to pay said judgment in order to give good title to the real estate sold under the power of sale in the will is not tenable and his account is hereby surcharged with \$513.52, the amount paid him, with interest thereon from July 3, 1911, the date of said payment. *Sayles v. Best*, 140 N. Y. 368.

The second objection deals with the expenses incurred in the burial of the widow of the decedent, which was paid out of his estate. Had the husband been living at the time of her death he would have been bound in law to provide a funeral for her at a reasonable expense (*Patterson v. Patterson*, 59 N. Y. 583); and if she left a sufficient estate he would have been entitled to reimbursement out of that estate. *McCue v. Garvey*, 14 Hun, 562; *Matter of Very*, 24 Misc. Rep. 139; *Matter of Pearce*, 53 id. 216.

The law requires the burial of the dead, and that duty falls upon the husband or wife or other relative of the decedent, or may rest upon a stranger under whose roof the death occurred. *Matter of Beekman Street*, 4 Bradf. 503; *Snyder v. Snyder*, 60 How. Pr. 368.

The account filed shows a balance of \$2,130.82, subject to commissions and expenses of accounting.

It does not appear that the widow left any estate.

No statutory duty is imposed upon children as regards the burial of parents. The legal, though unnatural, objection herein by two of the children is based on the claim that the will does not provide for the burial expenses of the widow.

The testator made his will December 26, 1885, and died March 19, 1886, and letters testamentary were issued May 17, 1886, to the widow and Thomas E. Waters. The testator lived less than a year after his will was made. He knew his wife's financial condition. She was trusted by him as he made her one of his executors. He intended that the companion of his bosom, and the one who had helped to tote the weary load of life in double harness, should not want, for he provided that she might use their entire joint accumulations if necessary "for her support." Frugal, she transmitted the corpus of the estate, about \$3,000, to children, two of whom have such a monetary thirst that they ask this court to direct that the administrator, etc., also a son and legatee, bear the expense of his mother's burial, personally, as will be the case if this item of his account is not allowed. In the absence of proof, on what theory should one son bear this burden personally, and another son and daughter escape? At times it is mighty hard to follow the antics of the intellect when on a dollar scent. If the will restricted the widow to the net income I would feel constrained to hold that the representative was without authority to bury her out of the corpus of the estate.

In *Zapp v. Miller*, 3 Dem. 266, the head-note reads: "Where a will gave to testator's widow the income of all of his estate, 'after deducting taxes, assessments, interest on mortgages, if any, and other charges and expences, for and during her natural life':—Held, under the doctrine of *ejusdem*

generis, that disbursements for funeral expenses, transportation of decedent's remains, and services of his attending physician, were chargeable to the *corpus* of the estate, and not to income."

The account filed, and as modified by this decision, shows an estate of \$2,644.34, subject to commissions and expense of this accounting. If the testator realized that some of the contents of his gall bag had dripped into any of his descendants, he probably would have left less crystallized sweat to them to quarrel over and would have taken care of the future burial of his wife in specific terms, rather than to chance it to strangers, or to charity, as two of his children wish, but not as all of them wish, be it said to their credit, though the latter, likely, would spurn praise for the performance of so sacred a duty. The position, too often taken by children, in regard to wills of parents, almost persuades men to bachelorhood.

I find no law that covers the question here involved and think that some ought to be made.

I therefore hold and decide that where a husband dies, knowingly leaving an indigent widow, and a will by the provisions of which he gives the life use of all of his property to the widow and provides: "If at any time the income of same is sufficient for her support, then she is to have as much of the principal, each year, as is necessary for her maintenance, including the income, as aforesaid," it was his intention that her reasonable burial expenses should be paid by his representative out of his estate, and the administrator herein is credited with the amount of the same.

Children are occasionally found whose sense of parental duty is consumed in the burning fire of avarice, but courts are rarely so constituted as to countenance the burial at public

expense of the penniless widow of a testator who left abundant means for her interment.

Objection is also made to an item in the account of ninety dollars and seventy-three cents, representing rents collected by the administrator after the death of the life tenant and before the sale of the real estate. The will contains this provision: "The rest, and residue I give and devise to my son, James F. Van De Walker, and to my daughter, Mary Ferris, share and share alike;" hence Van De Walker and Ferris became devisees of the real estate of the testator upon the death of the life tenant. Title to this real estate vested in said residuary legatees as the date of the death of the testator, subject to its use by the widow as provided by the will, and subject to their title being defeated by the exercise on the part of the executors of the power of sale given to them by the will. The executors acquired no power or jurisdiction over the real estate by the provisions of the will beyond the naked power of sale, and this administrator *cum testamento annexo* had no right to collect the rents, as that right, with the rents, belonged to said devisees, subject to being defeated by the exercise of the power of sale.

"Property that descends to heirs of an intestate, or passes under the will of a testator to devisees does not go to executors, or administrators, and if they assume possession of it, and collect the rents, the remedy of the persons entitled to it is by a proper action at law. A surrogate has no jurisdiction to determine controversies arising from such matters. His power to control the conduct of executors and administrators is limited to property of which they have the right of possession." Matter of Kane, 38 Misc. Rep. 276, and cases cited. "A surrogate's Court has no jurisdiction over realty left by a decedent, or its avails, unless brought within it by a will, or by a statute for the purpose of being dealt with for some special purpose, like the payment of debts in case the personalty is in-

adequate." *Matter of Sergeant*, 62 Misc. Rep. 173; *Sweeney v. Warren*, 127 N. Y. 426.

The surrogate, being without jurisdiction, has not power to allow or disallow the rent item objected to; hence can only order the same stricken from the account. *Matter of Spears*, 89 Hun, 49; *Matter of Place*, 1 Redf. 276.

Decree may be entered passing the account as modified.

Decreed accordingly.

Matter of Proving the Last Will and Testament of MICHAEL PEISER, Deceased, as a Will of Real and Personal Property.

(Surrogate's Court, New York County, March, 1913.)

WILLS—SIGNATURE OF TESTATOR AT END.

Where a single paper, consisting of two sheets of legal cap woven together in the web and folded so as to make four pages, was used in drafting a will, and the writing was commenced on the first page, continued consecutively on the fourth page and concluded on the second page with the signature of the testator, and there is no writing or signature on the third page, the instrument is signed at the end thereof within the meaning of the Statute of Wills and is entitled to probate.

PROCEEDING upon the probate of a will.

Feiner & Maass (Ira Skutch, of counsel), for proponents.

Joseph J. Baker and **Emil Adler**, submit brief for testamentary beneficiaries in aid of proponents.

Henry K. Heyman, special guardian, submits brief in aid of proponents.

Moses R. Ryttenberg, for contestant Louis Peiser.

Richard M. Bruno, for other contestants.

FOWLER, S.—There is but a single question in this cause: The paper propounded, by inspection is readily seen to consist of two sheets of legal cap, woven together in the web and never cut since they came from the paper maker. In other words, the two sheets are only such by manner of folding. Originally they were fabricated in one long sheet. As folded they now make two sheets, or four pages, susceptible of being written on. These two sheets, or four pages, are now backed by a separate cover fastened on by removable metal staples. The cover is indorsed, "Last Will and Testament of Michael Peiser, November 18th, 1908." The cursive script propounded covers the front page of the first or uppermost sheet, continues consecutively on the reverse side of the second or lowermost sheet, and then returns to the reverse side of the first sheet, ending thereon with the subscription of the testator, followed by a full attestation clause, subsigned by the attesting witnesses. In other words, the signature of the testator is on the reverse side of the first sheet and is followed by a blank page, over-written only on its reverse side. The reverse side, or third page, is not signed or identified by the testator. It follows in position page 2, where the testator's signature alone appears.

In the better and more concise language of counsel for the beneficiaries: "If we treat the paper propounded as having four pages, the obverse and reverse sides of the first sheet being treated as pages 1 and 2, and of the second sheet as pages 3 and 4, we can then say that the will starts on page 1, is continued on page 4, and concluded on page 2." It is page 2 which contains the signature of testator. This signature is followed

by the ordinary attestation clause, subsigned by the attesting witnesses in the usual manner. There being no allegation of fraud or forgery in this cause, and no suspicious circumstance disclosed, the authenticity of the testamentary script propounded being admitted, the presumption is that the will propounded is in the same condition it was in when the testator and the attesting witnesses placed their respective signatures on it and the testator duly declared it to be his last will and testament and requested the attesting witnesses to act as such. *Matter of Catrall, 1863, 3 S. & T. 419, 421.* But without the aid of legal presumption, the paper propounded bears both internal and external evidences of genuineness and that it was composed and written at the same time, and in its present order. When the draftsman of the will had ended writing on the first page he had finished only a part of the third dispositive clause of the will. He then reverted to the fourth blank page where, at the top of the page, he was at pains to note in writing, "Third (continued)," evidently meaning that the third clause of the will which began on the first page was to be continued on the fourth page as, in fact, it was.

The written language of the three utilized pages is closely consecutive and in order. The entire paper contains internal evidence that the will was all composed and transcribed at the same time. Without the aid of the writing on the fourth page, or in other words on the reverse side of the second sheet, the balance of the testamentary paper is unintelligible. It is manifest that the draftsman of this will began writing on the first page, turned over to the fourth page, which he filled with words, and then went back to the second page, where he ended the will and caused it to be subscribed by the testator and subsigned by the attesting witnesses. As already stated, there is no issue of fraud or forgery involved in this probate proceeding, and there is manifest an intention on the part of the

testator to comply with the Statute of Wills. The only question before me then is, "Is the testamentary script, propounded, subscribed in this particular instance by the testator at the end thereof, within the true meaning and requirements of the Statute of Wills (2 R. S. 63, sec. 40, now sec. 21, Decedent Estate Law)?"

Had it not been for the decision of the Court of Appeals in *Matter of Field*, 204 N. Y. 448, I should have no hesitation in holding that prior decisions of this state compelled me to conclude that the paper propounded was not subscribed by the testator at the end thereof within the meaning of the present Statute of Wills. *Matter of Whitney*, 153 N. Y. 259; *Matter of Andrews*, 162 id. 1, *Matter of Blair*, 152 id. 645; *affg.*, 84 Hun, 581; *Matter of Conway*, 124 N. Y. 455; *Matter of O'Neil*, 91 id. 516; *Sisters of Charity v. Kelly*, 67 id. 409. Although in principle these cases are often attempted to be distinguished by reason of certain special features peculiar to each case, I confess I am utterly unable to distinguish this case before me from the principle of those decisions. Those decisions place form above substance. But *matter of Field* modified this rule, and I am now to determine whether or not this will is within the principle announced in *Matter of Field*. If it is so, I must pronounce for the will; otherwise, against it.

When I just said "within the principle announced in *Matter of Field*" I should explain what I mean. The principle of *stare decisis* is not the equivalent of *res judicata*. The latter term relates more to controversies on pleas in bar and to the particular judgments rendered on the peculiar facts of a given case. It is a very trifling conception of the doctrine of *stare decisis* to affirm that it applies only when the identical facts are again shown and the court must render a precisely similar judgment. If that were the true limitation of the doctrine of *stare decisis*, the difficulty would be that in all human prob-

ability the facts of one cause could never again be precisely repeated in any future cause. All logicians concede that identity, or coexistence, or coinherence, is a relative term or figure of speech. Identity exists only in mathematical science or in the abstract, if at all. The doctrine of *stare decisis* relates to legal principles, not to facts. At common law the only thing in a decision binding as authority under the rule *stare decisis* is the right principle upon which the case was decided—*ratio decidendi*—and not the application of such principle. Lord Walpole v. Earl of Cholmondeley, 7 T. R. 138, 148; Lord Eldon in *Browning v. Wright*, 2 B. & P. 13, 24; *Merry v. Hickalls*, L. R., 7 Ch. Div. 733, 750, 751, *Osborne v. Rowlett*, 13 Ch. Div. 774, 785; Lord Herschell in *Trego v. Hunt*, 1896, A. C. 7, 14. While these are English decisions, and by reason of their late date of no authority here, they well express the common law doctrine often recognized here, and our common law is the same on this point. *Carroll v. Lessee of Carroll*, 16 How. (U. S.) 275, 286.

The principle of the adjudications of this state prior to the year 1912 was that our Statute of Wills required a will to be subscribed by the testator at the physical or actual end or foot of the testamentary document. It would not do prior to 1912 to subscribe a testament in the middle of the paginal order, or even at the logical, or intellectual, or speaking end of a will not written in a consecutive order of pagination. If the adjudications prior to 1912 do not disclose this principle, they disclose nothing else to my mind. It is idle to attempt to reconcile the decisions of our courts prior to 1912 with any other conclusion, and I will not resort to such an effort. There was by those decisions, in short, no such thing as a "constructive end" of a will. Since *Matter of Field* there is a "constructive" as well as an actual or physical end of a will.

The physical end of the will in order of pagination alone no longer determines the true place for testator's signature.

The history of the English Law of Wills under the English "Wills Act" of 1837 (1 Vict. chap. 26) illustrates what I mean. Section 9 of that act provided "That no will shall be valid unless it be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction." The tendency of the English decisions on the act of 1st Victoria was to hold that the "foot or end" meant the physical, and not the logical, or speaking, end of the will (*Smee v. Bryer*, 1 Robt. 616; 6 Moo. P. C. 404; *Allen v. Maddock*, 11 id. 456), although occasionally the English courts were induced to take a less literal view of the Statute of Wills, and to hold that that statute intended that the testator might sign at the logical, and not the physical, end of the will. The conflict of the decisions and the constant judicial destruction of wills under section 9 of the Wills Act of 1st Victoria created such popular dissatisfaction in England that section 9 of the Wills Act was amended by the Wills Amendment Act of 1852, called "Lord St. Leonard's Act" (15 Vict. chap. 24), which tended to make testator's subscription valid if it was actually made at the "logical, or speaking, or intellectual" end of the will, without regard to the natural arrangement of the pagination of the testamentary medium. But the explanatory act of 1852 is very unlike Lord St. Leonards' other technical work, as it is, I think, both prolix and confused and not to be imitated here. It contains a saving clause which to my mind nullifies the benefit intended. It provides "that no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or follows it, nor shall give effect to any disposition or direction inserted after the signature shall be made." This reopens

the whole question concerning the true end of a will, and modern English authorities are not very illuminating on this point.

The result of Lord St. Leonards' Act has been, I think, in England that much oral or extrinsic evidence is admissible to show the actual condition of the testamentary script at the time the testator signed it. The consequence of this line of authority is to make a valid execution of a will in writing more largely dependent on extrinsic evidence than I should think at present expedient in like cases under a statute which requires wills to be in writing. *Matter of Blair*, 84 Hun, 581, 584; *Matter of Will of Hewitt*, 91 N. Y. 261, 264. But I have not fully investigated that point of evidence as it is not now here. I have therefore no deep seated conviction on it. Much is to be said for and against the admission of extrinsic evidence in such cases.

But even since the Wills Amendment Act of 1852 in England, the English courts are (where nothing actually dispositive follows the signature of the testator) inclined to ignore the actual order of the pagination of a testamentary paper, and to hold that if the testator signs at the logical or speaking end of an ill arranged continuous script, there is a substantial or constructive compliance with the statute. In *bonis Wotton*, 1874, 3 P. & D. 159; In *bonis Birt*, 1871, 2 id. 214; In *bonis Ainsworth*, Id. 151; In *bonis Coombs*, L. R., 1 P. & D. 302. Of course these late English decisions, though entitled to great respect as opinions of learned men, are not authorities in this jurisdiction.

Under our present Statute of Wills, and long before the decision in *Matter of Field*, the surrogate of this county, in the year 1847, had said that that statute was open to the construction that *the end* of the will meant not the physical end only (for, as he correctly stated, there are two physical

ends to a paper), but the intellectual or speaking end of the script, which does not admit of two dimensions. Matter of John Tonnele's Will, 5 N. Y. Leg. Obs. 254. In other words, the surrogate interpreted the Statute of Wills largely, so as to make the requisite of the statute apply to the constructive and not to the merely actual end of a testamentary paper. In England what the surrogate, in Matter of Tonnele's Will, called the "intellectual or speaking end of a will," is generally termed "the logical end." Matter of Goods of Walton, L. R., 3 P. & D. 159; Goods of Stoakes, 23 Wkly. Rep. 62. The judgment in Matter of Field, in 1912, goes not one whit further than that of the surrogate in 1847; it makes the end of the will not the physical end only, but the logical or speaking end of the instrument, as actually written. In a case where there is shown no suspicious circumstances or any fraud or imposition and the testamentary script is in perfect grammatical sequence, and it is apparent that the testator, as matter of fact, signed his will at the logical or grammatical end thereof, and there is no inherent evidence that any dispositive clause was written after such subscription, then the physical arrangement of the pages or sheets will not be controlling, and in the absence of proof to the contrary the grammatical context will be suffered to determine the end of the will. Such, I think, is the principle of the decision in Matter of Field, under the true doctrine of *stare decisis*, before noticed.

The case before me I am unable to distinguish in principle from Matter of Field. This testator, Mr. Peiser, signed at the place where the draftsman of the will "stopped writing in the consecutive order of composition." The will when read consecutively, "as the mass of mankind would read it," has the signature of the testator at the end thereof, within the meaning of the Statute of Wills. This case and Matter of Field much resemble the English case "Goods of Stoakes,"

cited before, where the same conclusion was reached. I find that Mr. Peiser's will sufficiently complies with the Statute of Wills in view of the facts disclosed by the evidence. The paper propounded is therefore entitled to probate.

Probate decreed.

In the Matter of the Application of CATHERINE BROWN, Administratrix of EDWARD J. BROWN, Deceased, for a Decree Directing the Disposition of His Real Property for the Payment of His Debts.

(Surrogate's Court, Kings County, March, 1912.)

SURROGATES—SALE OF DECEDENT'S LANDS FOR PAYMENT OF DEBTS—NO JURISDICTION TO SET ASIDE SALE AND DIRECT A RESALE.

Where a decedent's lands have been sold for the payment of debts, and the administratrix has received earnest money from the purchaser, the surrogate is without jurisdiction to set aside the sale, direct a resale and a return of the earnest money.

PROCEEDING for the sale of decedent's real property for the payment of his debts.

John F. Canavan, for petitioner.

Harry J. Sokolow, for Susan Halliday, purchaser.

KETCHAM, S.—In this proceeding, for the sale of decedent's lands for the payment of debts, the administratrix, pursuant to the decree, has sold the lands at auction and has received earnest money from the purchaser.

She now asks that the sale be set aside, that a resale be directed and that the amount received by her from the purchaser be repaid.

The circumstances disclosed are such that the application would be granted if the court could find power to entertain it. Such power is denied by the only known authority on the subject. *Matter of Bridgeport Brass Company*, App. Div. Second Department, February, 1913.

The result is harsh and injurious. Human life would be happier and, no doubt, executors and administrators charged with the sale of lands for the payment of debts would find a larger peace and safety if the statutes could only be so construed as to invest the surrogate with the power to control such sales.

The present condition is, for the present, bad; but no power has yet been given to any human agency to find a law to be other than it is because the law would be better if it were not. This court, however personally fond of ethical justice, cannot usurp the splendid irresponsibility of saying that the refusal of jurisdiction, which is manifest in the written law, must at once be read as if it were a grant of jurisdiction if only it can appear that a truly good and lofty end will be served by the judicial perversion.

It has been said in the Court of Appeals that the people of the state of New York have not yet been willing to invest their surrogates with all the powers of a chancellor. It is at least equally certain that the people have not committed to this limited court the right to read the law contrary to its obvious meaning. That dread faculty has never been held to belong to anybody except the people themselves.

The motion must be denied.

Motion denied.

Matter of the Judicial Settlement of the Account of JOHN R. MARSHALL and JOHN E. SAVERY, as Executors of the Last Will and Testament of WALTER MARSHALL, Deceased.

(Surrogate's Court, Kings County, March, 1913.)

WILLS—BEQUEST IN CASH AND AMOUNT DUE TO TESTATOR ON A CERTAIN MORTGAGE—DISCHARGE OF LEGACIES GIVEN BY, IN EVENT THAT ABATEMENT SHOULD BECOME NECESSARY.

TRUSTS—FOR SEVERAL BENEFICIARIES—CONSTRUCTION OF TRUST—REMAINDER OF TRUSTS FUND TO WHOM PAID—EXECUTORS AND ADMINISTRATORS.

A bequest of \$1,000 in cash and \$1,000 due to testator on a certain mortgage is, standing alone, a general legacy of \$2,000 payable from the demonstrated source if available, otherwise from the general estate, though by a subsequent clause of the will said mortgage is made applicable to the discharge of each of many legacies given by the will in the event that abatement should become necessary.

Where a trust for several beneficiaries successively provides that in the event of the death of the one last named the remainder of the trust fund shall be paid to the husband and children of testator's sister, in such sums from time to time as in the judgment of the executors may seem best, and all the beneficiaries die before testator, except certain of his sister's children, the trust as to them is accelerated and is to be construed merely as a direction that the trust fund must be paid to them immediately.

The words "in such sums from time to time as in the judgment of the executors may seem best," so far as they might operate to invest the executors with a discretion to postpone payment, are too indefinite to yield any practical meaning.

PROCEEDING upon the judicial settlement of the account of executors.

John T. Bladen, for executors.

William J. Mahon, Special Guardian for Annie Dorothy Taylor, an infant.

Joseph A. Keenan, Special Guardian for Emily Guttridge, incompetent.

KETCHAM, S.—Construction is required of the following:

“*First.* After all my lawful debts are paid and discharged I give and bequeath unto William Marshall my late wife’s son, Two thousand (\$2,000) Dollars—One thousand dollars in Cash, and one thousand dollars due on a certain Mortgage, executed to me by Francis M. Witt, bearing date May 1, 1873.”

This gift is primarily of \$2,000 in words which, standing alone, would constitute a general legacy. The mere devotion of a designated portion of the decedent’s estate to the payment of the legacy in part only makes the legacy *pro tanto* demonstrative. *Giddings v. Seward*, 16 N. Y. 365.

That being its character, it is payable from the demonstrated source, if available, and otherwise, from the general estate.

Again, words constituting a general gift must prevail unless subsequent language, at least equally expressive, imposes a specific character upon the gift. *Roseboom v. Roseboom*, 81 N. Y. 356; *Hacker v. Hacker*, 153 App. Div. 270, and cases cited.

But in the sixth paragraph the mortgage is made applicable to the discharge of each of the many legacies contained in the will, in the event that abatement shall become necessary. The mortgage cannot be merged in the general assets and be also the subject of a specific gift.

The third paragraph contains a trust for several beneficiaries successively, and finally, in the event of the death of the beneficiary last named, it provides as follows: “But in the event of

her death, I desire that the remainder of the trust fund be paid to the husband and children of my sister, Maria Tayler, in such sums from time to time, as in the judgment of the executors may seem best."

All the beneficiaries of the trust having died before the testator, except certain children of Maria Tayler, the sister, the trust for such children is accelerated and the provision is to be construed as if it were merely a direction that the trust fund should be paid to such children. This, then, would be a dry trust, and the children of the sister, when ascertained, would become legatees of the fund in the same manner as if it were directly given to them.

The sister having died between the making of the will and the death of the testator, and several of her children having died in the same period, the two children who survived such period become the only remaining beneficiaries. The only gift to any of the sister's children was contained in a direction for payment in the event of the sister's death. This was future, and not vested. It was a provision for a class and inures only to the benefit of those who are revealed as members of the class at the time when the payment is to be made.

The legacy must be immediately payable to these children, despite the qualification that it is to be paid "in such sums from time to time as in the judgment of the executors may seem best." These words, so far as they might operate to invest the executors with a discretion to postpone the payment, are too indefinite to yield any practical meaning. They must receive such construction as will maintain the validity of the provision, rather than a construction which would destroy it. A direction that a legacy should be paid by executors only when they should in their discretion choose to pay it would at least be of doubtful validity. It may be saved by the interpretation that the only discretion vested in the executors is such as

will accord with the law and that the fund is payable at once.
Let a decree be submitted in accordance with these views.
Decreed accordingly.

Matter of HENRY C. BROWN, Petitioner.

(Surrogate's Court, New York County, March, 1913.)

GUARDIAN AND WARD—APPLICATION BY FATHER OF INFANTS FOR ANNUAL ALLOWANCE FOR SUPPORT AND MAINTENANCE—ALLEGATION IN PETITION THAT PETITIONER IS UNABLE TO MAINTAIN INFANTS—APPLICATION BY GUARDIAN FOR REIMBURSEMENT FOR PAST MAINTENANCE.

Upon an application by the father of two infants, as guardian, for an annual allowance for their support and maintenance, the court must take into consideration the circumstances of the father, and his petition must allege that he is unable to maintain said children.

Upon such an application the court must also take into consideration the amount of the infants' fortune, and where it appears that the yearly income therefrom is \$24,000 and that the infants are two girls aged, respectively, three and eight years, an order will be granted requiring the trustee to apply \$5,000 for the maintenance of each, and the guardian's application for reimbursement for past maintenance will be denied.

PETITION by guardian for an allowance for support and maintenance of two female wards.

Lord, Day & Lord, for petitioner.

Bowers & Sands appear formally for executor, and neither oppose nor consent to application.

FOWLER, S.—This matter comes on for hearing on a petition of the guardian for an annual allowance of \$18,000 for the future support and maintenance of two infant females, and also for an allowance of \$27,724.68 for their past maintenance, all to be paid out of the income of the infants' estate. It is unnecessary to say that the general rule is that the entire cost of maintenance of well-to-do infants shall not exceed the sum total of the interest on capital. This application I understand does not involve a resort to principal.

The application for an allowance out of the estate of an infant is always very serious. In legal theory, the chancellor, or the court substituted for the chancellor, in this instance the surrogate, is the guardian of incompetents. Formerly a warrant to that effect passed with the chancellor's seal of office. The relative commissioned as guardian is only the guardian designate, or official of the court, and if the court expressly sanction improvidence or waste of the infant's estate, it is not only "error," but a wrong to the child done by the court. Thus it is that these applications require our serious consideration at all times. The surrogate's present jurisdiction of this matter flows from section 2804, Code of Civil Procedure.

I am asked in this matter to allow out of the income coming into the hands of their guardian \$18,000 per annum for the support and maintenance of an infant under seven and a minor over seven years of age. Although the law distinguishes an infant from a minor (*Rex. v. Delaval*, 3 Burr. 1434, 1436), they may be regarded in this matter as either infants or minors. The children are respectively three and eight years. It is stated in the petition that the best interests of these very young girls demand that an allowance should be made which will permit their maintenance "in a manner in keeping with their position and prospects." I confess that I do not quite understand the present meaning of the allegation concerning the

"position" of these infants. There is some authority in old books for the allegation concerning the "position" of infants, as the position of infant heirs was then to be taken into account in fixing their allowance. *Harvey v. Harvey*, 2 P. Wms. 22; *Eversley*, Dom. Rel. 637. In times past and in a country where the higher gradations of rank involve profound and exacting obligations of duty, rank or "position," which I take to be synonymous in law, may well have been taken into consideration by the chancellor in fixing allowances. In this country, where rank is not recognized, the more usual averment at the present day is that the "situation and the fortune" of the infants are such as to be taken into account in fixing the allowance for the support, education and maintenance of such infants. The former great and necessary obligations of a legally recognized "position" are with us, I fear, in cases other than this, too often confounded with mere luxury, or habitual and trifling display. In the interests of infants, committed to the care of this court, I am tempted to offer tentatively some observations, taken from the precedents, on certain features of the education and maintenance of infants, which I think may, with more accuracy, be taken into account by the surrogate in fixing future allowances for the support, maintenance and education of wealthy infant wards of court.

The father of the infants in this instance is their guardian, and in his petition he alleges that he is unable to maintain the children. This is a necessary allegation on an application of this kind, and a prerequisite to the order sought. *Errat v. Barlow*, 14 Ves. Jr. 202; *Buckworth v. Buckworth*, 1 Cox, 80; *Voessing v. Voessing*, 4 Redf. 360; 3 Pom. Eq. Juris. § 1309. The court must always take into consideration on such an application as this the circumstances of the father. *Tweddell v. Tweddell*, Turn. & Russ. 13; *Allen v. Coster*, 1 Beav. 202; *Rice v. Tonnele*, 4 Sandf. Ch. 568, 570. Another essential

element for consideration is the amount or aggregate of the infant's fortune.

The aggregate fortunes of these children are scheduled at \$580,034.50, which safely invested at four per cent would produce about \$24,000 per annum. I confess I do not altogether like the showing made by the petition. It is evident to me therefrom, that before their mother's death, the "*spes successionis*" of these very young ladies had been blighted by an unusual extravagance, and the considerable estate now coming to them from her is not nearly so large as they had a birthright to expect from a once rich but very improvident parent. But if we pass the allegations to this effect, and assume that these young ladies are, or will be, in receipt of a yearly income of \$24,000, the question is, what portion of it should be allowed to their father as their guardian for their support, education and maintenance? Of course, the guardian must duly account for the allowance, whatever it is. On his first accounting the sufficiency or excess of any allowance ought to appear.

It must be recognized that the amount allowed for the maintenance of infants differs with the circumstances of each case. I recognize that already these particular young ladies are habituated to luxury to some degree, and that their proper care and future education must not be overlooked. The statement of the petition in regard to the necessities of the "infants' position" I cannot consider for a moment in fixing their allowance. Children, so young as these, have no position in any sense of that term to maintain, and it has been observed that children of "position" are usually the simplest in their upbringing. In fact, simplicity and a good childhood are synonymous in the vocabulary of right-thinking people. All children are benefited by simplicity, and the children of the really great are generally the most simple in their upbringing and in respect of their clothing, diet and the like. Simplicity and a natural

distinction are the best characteristics of an elevated childhood. The item which I regard as of most importance to these young ladies is a good and even an expensive secular and religious education, and for that purpose the allowance to their guardian should be liberal to the extreme. No specific mention of those items is, however, contained in the petition. But formerly in chancery the secular and religious education of an infant ward of court was a subject of much concern. *Kettletas v. Gardner*, 1 Paige, Ch. 488; *Story Eq. Juris.* § 1341; 3 *Pom. Eq. Juris.* § 1308. Certainly both of these most important matters are still entitled to be taken into consideration in fixing the allowance. *Wilkes v. Rogers*, 6 Johns, 566, 574, 575.

The guardian's petition alleges, in substance, that the use of the infants' income will be much more to their advantage than its accumulation. This seems to me to be an extraordinary allegation for a guardian of two very little girls. This allegation does not meet my approval. The lessening interest and value of money, the increase of taxation and greater costs of living, demand otherwise of their guardian. The estate of these infants should, if possible, be augmented against their respective majorities and subsequent marriages, and all the income over the necessary cost of their proper maintenance, support and education, should be invested at interest and put aside for their future benefit. It appears that the infants have no longer an expensive estate to maintain in the country, as it has been leased under a contract of sale. This is as it should be. But as an individual and private home is doubtless expedient for two young ladies of any age, this is to be taken into consideration in fixing the allowance. In *Griggs v. Gibson*, In Ch. 1873, 21 W. R. 818, an allowance was sanctioned for furnishing a home for infants, there being no opposition from any quarter to the order. It seems to me that an annual allowance of \$5,000 out of each infant's income ought to be amply sufficient to maintain

support and educate them in an appropriate manner, suitable to their excellent condition and their fair estate.

I am aware that it has been said that courts endeavor to promote the infants' permanent happiness, and that they have declared that it is not always promoted by rigid economy. Woerner, *American Law of Guardianship*, 169, citing *Matter of Burke*. But in *Matter of Burke*, 4 Sandf. Ch. 617, the vice-chancellor's statement to this effect is much modified by the fact that the young ladies' fortune was relatively small, and it was rightly thought better to maintain them at home at greater cost than to maintain them at a boarding school for less. Ten thousand per annum is not, however, rigid economy for any station in life, much less for two infants. An aggregate of \$10,000 per annum seems to me to border on the side of extreme liberality. I observe in *Matter of Goodwin*, 122 App. Div. 800, that the Appellate Division of this department regarded one-half of infant's annual income of \$4,000 as a proper allowance in view of infant's invalidism. But there the income was smaller than those involved in this proceeding. At a time when these young ladies now in court are called upon to go formally into the world some slight increase of allowance may be expedient and even proper. Courts by precedents of authority are authorized to take such facts into consideration in augmenting an allowance. But such exigencies are in this case fortunately still remote.

In regard to the application for reimbursement of the guardian by the trustees of moneys expended by the guardian before his appointment for past maintenance of his wards, or for expenditures for their benefit, it must be denied, as the surrogate has no power to grant it. *Matter of Scherrer*, 24 Misc. Rep. 351.

Submit order on notice, requiring the trustee to apply \$5,000 a year for the maintenance of each of the infants out of

the income of the trust created for their benefit, and denying the application of the guardian for reimbursement for past maintenance.

Decreed accordingly.

Matter of Proving the Last Will and Testament of
ANONYMOUS, Deceased.

(Surrogate's Court, New York County, March, 1913.)

**WILLS—BEQUEST OR DEVISE TO TESTATOR'S DAUGHTER, WHEN EFFECTIVE
—ADOPTION OF ILLEGITIMATE CHILD OF WHICH TESTATOR WAS THE
FATHER—CONDITION SUBSEQUENT.**

A condition, that a bequest or devise to testator's daughter shall not be effective unless within six months of testator's death her legal adoption of an illegitimate child of which testator was the father shall be annulled, is a void condition subsequent and the daughter takes without condition.

PROCEEDING upon the probate of a will.

FOWLER, S.—This is a case of construction sought in a proceeding for probate. The will is entitled to probate. Testator by his will bequeaths and devises one moiety of his residuary estate, both real and personal, to his executor on trusts for the benefit of his natural son, an infant under fourteen years of age. The other moiety is bequeathed and devised by testator to his executor on trusts for the benefit of testator's legitimate daughter, who was then either a widow or a married woman. The remainders over are to the son and daughter, or failing them to issue. It appears by the will that the unnatural mother of the infant son had abandoned him, or surrendered

or committed the child to his natural father, and that thereafter she had married some one other than the child's father and disappeared. The son was baptized a Catholic and in baptism received the name of his natural or *de facto* father. In this situation testator's daughter, without her father's knowledge or consent, formally adopted the infant as her own, and she gave him her husband's name. It is stated in the will that this adoption was pursuant to the law of this state. Whether the daughter was moved by compassion, affection or religious scruples, to adopt the natural son of her father does not appear. That such adoption was without her father's consent and that he wishes the infant to bear his name does appear in his will. Testator's will nominates his daughter as the guardian of his infant son. In a separate clause of the will, quite distinct from the words of gift, testator provides, in substance, that such adoption of the infant son is to be undone within six months after testator's decease, unless undone before, and if testator's daughter fails to have rescinded and annulled and made void and of no force or effect the said adoption, or in any manner interferes or seeks to prevent the infant son's resumption of his baptismal name, then in that event any provision of the will in trust for her or otherwise shall be and become wholly void and of no effect, and immediately accrue to the benefit of the said infant son of testator. The will fails, however, to revoke the nomination of the daughter as the guardian of the infant. The validity of this appointment of the testamentary guardian has not been discussed and need not be considered.

The first question made on the will is, Are such provisions of the will valid or void? and next, if void, Does the daughter take free of the void conditions imposed on the different testamentary gifts to her? It is apparent to me that the adoption under the laws of this state must be assumed for the purposes of this cause to be regular and complete, as the maxim,

"Omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium" applies to any such judicial act of record. It establishes the relation of parent and child. It is also apparent to me that the clause of forfeiture of the testamentary gifts to the daughter, in trust or otherwise, is in the nature of a condition subsequent and not precedent. Thus it is that the daughter's interests, both legal and equitable, are to be taken as vested. When I speak of testamentary "gifts," it is in accordance with common law usage, although it is well known that there is in law no gift without delivery, and what is really meant by a "testamentary gift" is only the right of succession to property of the defunct. Counsel state that they are unable to find any precedent for this case exactly in point and they cite none, but they argue that by analogy the condition imposed on the "gifts" to testator's daughter is void. I must consequently resolve for myself the questions presented for construction.

It is perhaps not strange that we find no precise precedents for this matter either in the books of the common law or in this state, as it is familiar that adoption was unknown to the common law, and the status exists here only by virtue of modern statutes, modelled to some extent, in conception at least, on the "arrogation" and "adoption" long familiar to the civilians. The statute (Dom. Rel. Law, § 114) prescribes the effect of adoption and creates the relation of parent and child, with all the duties and responsibilities attaching to such relation at common law. The adopted parent must bestow parental care on the adopted child, and while the relation of parent and child continues is to be held to all the parental obligations. A condition in a gift to an adoptive parent, that such parent shall forfeit or annul or set aside the parental ties created by the law, or shall act toward the child in any way contrary to the nature of a mother is, I am convinced, *contra legem* and not to

be contemplated for an instant. It cannot be otherwise. Such a conclusion is too obvious to need any citations of authority. But for abundant precaution we may resort to the analogies.

In all modern systems of law which I have examined "*conditiones turpes*" or immoral conditions, sometimes called "conditions against morality," are considered as not inserted in legacies or other testamentary gifts (Tompkins & Jencken, Modern Roman Law of Holland, 225; 1 Troplong, Donations Des Testaments, 308; Pothier, Oeuvres, vol. 5, p. 503). This was so in the classical Roman Law (D. 28, 7, 9) and is still so wherever the Civil Law obtains. Code Napoléon, art. 900. Few other departments of the common law owe more to the civilians than does that concerning conditions. The common law governing legacies and testamentary gifts is also, in the main, but a transcription of the Civil Law. The application alone is new. 2 Jarman, Wills, 15; Spence, Eq. Juris. 542; Scrutton, Roman Law and Law of England, 157, 158; Kerley, Hist. of Eq. 141.

The early common law concerning conditions will be found stated in Bracton, Coke, Sheppard's Touchstone and Perkins' "Profitable Book." All these writers recognize that a condition to omit a duty or against the law, "*contra legem*," or public policy is void. Bracton, f. 19; Coke, 66a, 206a, 206b, 219a; and see Mr. Butler's note 99, Coke on Litt.; Sheppard's Touchstone, 132; Perkins, § 722. These writers in the main restate the Roman law without much, if any, variation. Coke only is regarded as a source of the common law, but all are authoritative in that law. Nothing since has been added to our modern law except the particular applications. Very late adjudications, both in England and with us, depend solely on these early commentators. Matter of Beard, 1 Ch. 1908, 383, 386. It is most apparent that the definitions and distinctions of the common law of conditions are, in the main, taken out of the Civil Law.

With this brief review of our existing law of conditions, we may next consider the modern application of the principles already announced. Mr. Viner, in his Abridgment, gives us the common law cases in his day bearing on conditions against or contrary to law. 5 Viner, Abr. 99. That a condition contrary to the donee's duty or legal obligation, or *contra bonos mores*, is void is there stated generally as it is in other adjudications now binding in this state. Lord Hardwicke in *Earl of Chesterfield v. Janssen*, A. D. 1750, 1 Atk. 301; *Whiton v. Harmon*, 54 Hun, 552, 555; *Wright v. Mayer*, 47 App. Div. 604, 606; *Cruger v. Phelps*, 21 Misc. Rep. 252, 265; *Potter v. McAlpine*, 3 Dem. 108, 125; *Matter of Haight*, 51 App. Div. 310, 313. It is apparent to me from the authorities just cited that a condition annexed to a gift to a mother, whether adoptive or by nature, that she shall separate herself from her child and sever the parental relation and neglect her maternal duties to the child, is both contrary to law and against public policy and therefore to be taken as void. It makes no difference that in this case the child and its adoptive mother had the same father. In law the legitimate father of the daughter was not the father of the infant. The infant was *nullius filius*. The relation was what the common law terms "natural" and ignores.

This being so, as the obnoxious condition is a condition subsequent, it is as if it had never been written in the will. Had this been a condition precedent other principles of law might arise for our consideration. *Taylor v. Mason*, 9 Wheat. 325, 350. But it is a condition subsequent with which we are dealing, and the maxim of the Roman or Civil Law obtains: "*Conditiones contra leges vel contra bonos mores pro non scriptis habentur.*" In other words, the condition subsequent in question, being contrary to law and public policy, is to be regarded as not written in the will. Whether an invalid condition ought in ethics to be taken as not written in a will, or as invalidating

the legacy itself, is a very old dispute among lawyers. In classical times the Proculians contended that the Roman or Civil Law of legacies ought to be the same on this point as the Roman law of contracts, and the legacy void if the condition was void. But the School of the Sabinians triumphed on this point, and in the Roman law the legacy was absolute and the invalid condition treated as if not contained in the will. Grotius, however, among the moderns, disputed the rightfulness of this conclusion. Manuel de la Jurisprudence de Hollande, v. 2, ch. 18. The Code Napoléon followed the Roman law on this point (§ 900): "*Dans toute disposition entre-vifs ou testamentaire; le conditions impossibles, celles qui seront contraires aux lois ou aux mœurs, seront réputées non écrites.*" In so far as it concerns invalid conditions subsequent the testamentary common law on this point accords with the Roman law and the unlawful condition is ignored. Touchstone, 133; Moore v. Moore, 47 Barb. 257; Potter v. McAlpine, 3 Dem. 108; Whiton v. Harmon, 54 Hun, 553; Matter of Haight, 64 N. Y. Supp. 1029. I consequently hold that the condition subsequent in question is void, and the testamentary gifts, whether legal or equitable, to testator's daughter are without restriction by reason of the obnoxious condition concerning the annulment of the adoption.

There is one point left unnoticed by counsel on the argument, but which I cannot pass over. The testator in his will obviously desired his son to bear his name, and that was a fixed testamentary intention, almost an obsession on his part which is not to be lightly regarded in this court. What are called "Name and Arms" clauses in wills or deeds of gift are entirely valid at common law, but the expression of a condition to bear testator's name, or arms, requires a high degree of technical skill or it will fail. In this respect this will before me is inartificially expressed. The estate to the son is absolute, and there

is no gift over for his failure to take testator's name, nor is the gift to the son made dependent on the infant's assumption of the testator's name, nor is his estate to endure so long only as he bears testator's name and then over to some one else. Under the circumstances there is no way for the surrogate to effectuate the testator's evident desire to have his son bear his name. *Brooke, in re Musgrave v. Brooke*, 26 Ch. D. 792.

For the reasons expressed I now hold, as already indicated, that the testamentary gifts to the testator's daughter, whether legal or equitable, are without restriction by reason of the condition discussed and sought to be imposed by the testator. The decree for probate may pass as sought, but with the construction accorded to the testamentary script as herein indicated. Settle decree accordingly.

Decreed accordingly.

Matter of Proving Several Papers as Last Wills and Testaments of JOHN C. MARTIN, Deceased.

(Surrogate's Court, New York County, March, 1913.)

SURROGATE'S COURT—MOTION TO CONSOLIDATE SEPARATE, CONTESTED PROBATE PROCEEDINGS—MOTION AT CHAMBERS FOR AN ORDER REGULATING THE PROCEDURE ON THE TRIAL OF A CONTESTED PROBATE PROCEEDING.

A motion to consolidate separate, contested proceedings for the probate of instruments in writing purporting to be last wills and testaments is a part of the trial of a contested probate proceeding; and in the county of New York such a motion must be made before the surrogate assigned to preside at the "trial term."

A motion made at chambers for an order regulating the procedure and order of proof on the trial of a contested probate proceeding will be denied as premature.

MOTION to consolidate contested proceedings for the probate of two testamentary scripts.

Allen & Sabine, for motion.

James Cowden Meyers, Frederick W. Garvin, Parsons, Closson & McIlvaine, Graham & L'Amoreaux (Charles H. Beckett, of counsel), opposed.

FOWLER, S.—The proponent of a later testamentary script, under contest moves at Chambers of this court for the consolidation of a separate proceeding to probate an earlier testamentary script, also under contest. The present motion is contested, and contestants urge the preliminary objection that the motion is addressed to the discretion of the surrogate sitting for the trial of contested probates, and should be made when the trial of the probate proceeding comes on for hearing and not in advance, or before the surrogate sitting for the dispatch of Chambers business. Section 2504, Code of Civil Procedure, prescribes the class of business which is cognizable by the surrogate presiding at Trial Term of this court. All other business is to be disposed of by the surrogate sitting at Chambers. But it is unnecessary to go beyond the motion now before the court. All contested probate proceedings must be disposed of at the Trial Term by the surrogate assigned to that part. Of course section 2504 (Code Civ. Pro.), in the instance of the Surrogates' Court for this county, is modified by section 2547 (Code Civ. Pro.), allowing the surrogates of this county to send probate issues for a trial by a common jury. It is apparent to me that the statute vests the jurisdiction over contested probate proceedings, or the former contentious probate jurisdiction, exclusively in the surrogate of this county who is assigned to preside at the Trial Term. Code Civ. Pro., § 2504.

Too strict an interpretation of section 2504 (Code Civ. Pro.) might, however, hamper the business of this court, and result in an alternate surrogateship in this county, rather than in a dual or concurrent surrogateship intended to double the efficiency. It is, however, plain enough that the language of section 2504 (Code Civ. Pro.) confines the jurisdiction of the surrogate assigned to the Trial Term and presiding at the Trial Term to contentious probate proceedings. Of course he may complete his unfinished Chambers business left over, but that is all. The surrogate sitting at Chambers must dispatch all the other business of the court.

Does the present motion fall under the statutory designation of business other than "contested probate proceedings," or is it an integral part of a contested probate proceeding? I am inclined to think that the motion is to be regarded as a part of a contested probate proceeding, and must therefore be reserved for a hearing at the trial, or contentious probate, term of this court. The probate jurisdiction of the surrogate is given by the statute (Code Civ. Pro., § 2472), but to some extent only is the proceeding for probate regulated by statute. When the statute is silent the surrogate proceeds according to the course of the testamentary common law, which is included in that great body of common law, prescribed as the ulterior or fundamental law of the state by the Constitution of this state. N. Y. Const. art. 1, § 16; *Martin v. Dry Dock, E. B. & B. R. R. Co.*, 92 N. Y. 70, 74; *Matter of Work*, 76 Misc. Rep. 403, 405, 406; *Matter of Connell*, 75 id. 574, 578; *Matter of Carter*, 74 id. 1, 7; *Matter of Meyer*, 72 id. 566, 569; *Matter of Swartz*, 79 id. 388. One of the obligations of a Surrogate's Court in this state is to identify and determine the constituents of the testamentary *res* propounded. *Matter of Foley*, 76 Misc. Rep. 168, 175. In the proceedings now before me, there is an allegation of revocation by a later testament,

and therefore a choice between two propounded scripts. The surrogate on the trial is to determine judicially which script, the earlier or the later, is entitled by testamentary law to probate. The order of procedure is left by the statute to the surrogate, and yet not to the arbitrament of the surrogate alone, but to the surrogate guided and controlled by the testamentary common law, organically prescribed by the Constitution. It may be useful to survey for a moment the organization of the Surrogate's Court, now continued by the Constitution of this state. Art. 6, § 15. Perhaps the relations which this court bears to the judicial system of the state may throw some light on the incidental powers of the surrogate, when the statute relating to procedure is silent. In any event a brief survey of the constitution of the Surrogate's Court is not irrelevant to some phases of the procedure of the court on the probate side. In no other way is the constitution of the Surrogate's Court better explained than by tracing the course of appeals from the surrogate.

In legal theory the surrogate continues, in most part (although his tenure of office is not now due to the Appellate Division or any other superior court), to be a subordinate official of courts vested with the higher jurisdiction. While the continuance of the Surrogate's Court is now protected by the Constitution of the state, and it has become a court of record, yet its relations to the Appellate Division of the Supreme Court of the state continue it in the class of "peculiar courts" known to the common law system. All the existing courts of this state have distinct reference to the preexisting establishments of the common law. Indeed the same characteristics pervade the judicial establishments of the thirteen original states.

At the present time the Appellate Division of the Supreme Court of this state happens to be the "Ordinary" in most matters committed to the jurisdiction of the surrogates of the

various counties. The surrogate's relations to the Appellate Division in this particular are now much those which long existed between the surrogate and the "Ordinary" of the old Ecclesiastical Courts. It is astonishing, although not an accident, how closely the present system is new-modelled on the old. The "Ordinary," in testamentary common law, is a term of the civil law, "*Ordinarius*," and indicates the higher judicial office in probate or other ecclesiastical jurisdictions in opposition to that of a subordinate official, extraordinarily appointed (*Surrogatus*), to exercise such jurisdictions. The surrogate is not the "Ordinary" in matters falling under the probate jurisdiction. It is sufficiently exact for present purposes, in tracing the present jurisdiction of surrogates, to say that formerly all "Ordinaries" had the power of appointing deputies, commissaries or surrogates of some kind. The old Canon law office of surrogate in England was, after the "Reformation," recognized both by the revised canons and by acts of Parliament. In New York after the year 1664, when this province came under English control, the crown (or the proprietary for a short time prior to the Duke of York's accession as James II) had an exclusive ecclesiastical jurisdiction and could in law delegate such jurisdiction to the governor of a crown province, such as New York was until the successful Revolution ending in independence. The governor of the province thus became the Ordinary in New York while it was under the crown. Chalmer's Colonial Opinions by Attorney-General Northey in 1705, p. 41; Chitty, Prerogatives of the Crown, 36. After 1702 the Royal Governor of New York appointed a surrogate to exercise the probate jurisdiction, and after 1746 all his local delegates were called surrogates in this territory. The royal governor's testamentary and intestate jurisdiction was exercised finally in the "Prerogative Court," of which he was the head. *Isham v. Gibbons*, 1 Bradf. 69, 78; *Kohler v. Knapp*, id. 241; *Matter of*

Brick, 15 Abb. Pr. 12; Matter of Thompson, 184 N. Y. 36, 40. After our independence of the crown the "Act to organize the State Government," passed March 16, 1778, invested the jurisdiction in intestate and testamentary matters, formerly exercised by the royal governor, in a judge of the Court of Probates, except that the surrogates in the several counties were thenceforth to be appointed by the Council of Appointment and commissioned under the Great Seal of the State. 2 J. & V. 23. The Revised Laws of 1813 ultimately defined the jurisdiction of surrogates under the first Constitution. 1 R. L. 444. Under the first Constitution of the state the judge of the Court of Probates acted as Ordinary and the surrogates as the *extra-ordinarii* in all matters formerly cognizable in the Prerogative Court of the Royal Governor of New York. The unwritten practice in all such courts continued to be closely patterned on that of the Ecclesiastical Courts of England. They continued the exemplars of the jurisdiction and practice in all the Courts of Probate of New York.

In every court, proceeding according to the Canon or Civil Law, there was always a right to appeal or resort to some higher tribunal for relief or protection. In the Ecclesiastical Courts of England the appeal was, in general, taken first to the Diocesan; thence to the Metropolitan and finally to the King in Council. Toller, Executors, 73. In New York prior to our independence appeals lay from the surrogate to the royal governor, or his Prerogative Court, and thence to the King in Council. On all such appeals the Ordinary could review the facts as well as the law, and sit as the trial court to take new evidence and then award judgment *de novo* on the merits. Matter of Brick, 15 Abb. Pr. 12, and authorities there cited; Vanderheyden v. Reid, 1 Hopk. Ch. 408, 412, and authorities there cited; Devin v. Patchin, 26 N. Y. 441, 445.

After the establishment of the state government appeals at

first lay from the surrogate to the Court of Probates. Under the second Constitution of the state, in force in 1821, the Court of Probates was abolished. Laws of 1823, p. 62; 1 R. L. 444. The office of surrogate was, however, continued and the appointment to it vested in the governor, with the consent of the senate. Prior to the Revised Statutes appeals lay from the surrogate to the chancellor and from the chancellor to the Court of Errors. At that time the course taken on such appeals was according to that in the civil and canon law courts. *Vanderheyden v. Reid*, 1 Hopk. Ch. 408, 412; *Van Wyck v. Alley*, id. 552, 553; *Scribner v. Williams*, 1 Paige, 550. The Revised Statutes of 1830 extensively remodelled the jurisdiction, powers and duties of surrogates under the second Constitution of the state, and regulated appeals from the surrogates. 2. R. S. 66, 95, 152, 608, 609. In the year 1837 the Revised Statutes themselves were extensively remodelled (Laws of 1837, chap. 460). The changes did not materially alter the powers of the appellate courts over surrogates' decrees and decisions. *Devin v. Patchin*, 26 N. Y. 441, 447; Laws of 1848, chap. 185; *Burger v. Burger*, 111 N. Y. 523, 526. Subsequent to the Constitution of 1846 and the Judiciary Act (Laws of 1847, chap. 280), the opinion was that the whole case continued open to review on appeals from surrogates. *Robinson v. Raynor*, 28 N. Y. 494, 497; *Schenck v. Dart*, 22 id. 420; *Gardiner v. Gardiner*, 34 id. 155, 164; *Clapp v. Fullerton*, id. 190, 195; *Burger v. Burger*, 111 id. 523, 528.

An attentive examination will disclose that the present Code of Civil Procedure was framed with precise reference to the ancient practice in New York, and the Appellate Division of the Supreme Court on appeals from the surrogate continues to act as Ordinary in testamentary matters. Appeals from the surrogate may be taken generally to the Appellate Division, and it then reviews matters of law and fact (Code Civ. Pro. § 2576)

and on most appeals (not within § 2588, Code Civ. Pro.) it has the same power to decide questions of fact which the surrogate has. As an original trial court in such cases the Appellate Division may take additional testimony or receive documentary evidence or appoint a referee so to do (Code Civ. Pro. § 2586), or it may reconsider on the merits the whole case *de novo*, just as the Ordinary under the Civil and Canon Law might do. *Matter of Laudy*, 78 Hun, 479; *Matter of Rogers*, 10 App. Div. 593; *Matter of Warner*, 53 id. 565; *Matter of Pfarr*, 79 id. 634, 88 id. 616; *Matter of Burr*, 116 id. 518; *Matter of Beck*, 6 id. 211, *affd.* 154 N. Y. 750; *Matter of Drake*, 45 App. Div. 206; *Matter of Rice*, 81 id. 223, *affd.* 176 N. Y. 570; *Matter of Snedeker*, 95 App. Div. 149; *Matter of Tyndall*, 117 id. 294; *Matter of Van Alstyne*, 142 id. 209; *Matter of Totten*, 179 N. Y. 112, 115. As in former times, the Appellate Division as such Ordinary is subject, as to errors of law, to the superintending power of a higher tribunal, which now happens to be the Court of Appeals. *Kingsland v. Murray*, 133 N. Y. 170; *Matter of Totten*, 179 id. 112; *Matter of Thorne*, 162 id. 238.

From this extended survey of the surrogate's proper jurisdiction over probate proceedings it must be apparent that this court was intended to continue on common law foundations, except where the statute otherwise provides. Now, there is nothing in the statute or in the late adjudged cases about the consolidation of separate proceedings to probate various testamentary scripts of one testator. Therefore we must look to the testamentary common law for the true procedure. The Statute of Wills regulates only the exercise of the testamentary power. It leaves all or nearly all the balance of the rules governing the testamentary succession to such common law. In *Matter of Work*, 76 Misc. Rep. 403, 408, I alluded to the inherent power of a surrogate to compel the production of any

other testamentary scripts than those produced in any proceeding for probate. I firmly believe such power is one of the incidental powers which flows from the general grant of a probate jurisdiction. *Sipperly v. Baucus*, 24 N. Y. 46; *Bevan v. Cooper*, 72 id. 317, 328; *Martin v. Dry Dock*, E. B. & B. R. Co., 92 id. 70, 74; *Matter of Camp*, 126 id. 377, 390; *Matter of Randall*, 152 id. 508, 516; *Matter of Runk*, 200 id. 447, 456; *Peebles v. Case*, 2 Bradf. 226, 243. It would, I venture to think, be an absurd condition of the law if the rule were otherwise. To be compelled to decree a probate of an earlier will produced, when it is alleged and admitted that there exists a later will not produced, would be productive of public mischief. Coote's Practice in the Ecclesiastical Courts (472) well indicates the former common law practice in such cases, and it is well understood that a similar practice was in force in this jurisdiction prior to the Revised Statutes. *Goodrich v. Pendleton*, 4 Johns, Ch. 549, 553; *Vanderheyden v. Reid*, 1 Hopk. Ch. 408, 411; reversed on another point, 5 Cow. 719; *Bogardus v. Clarke*, 1 Edw. Ch. 266, 267; 4 Paige, 623; *Matter of Work*, 76 Misc. Rep. 403, 405, 406; *Matter of Wagner*, 119 N. Y. 28, 36.

The procedure in contested probate proceedings, when not otherwise established by statute, has reference to the prior testamentary common law, and this is so both by the common law itself and by statute. Code Civ. Pro., § 2481, subd. 11. The rules of evidence applied in this court are, however, an exception to this statement, as they are now uniform with the rules applied in other tribunals of the state. *Peebles v. Case*, 2 Bradf. 226; Code Civ. Pro., § 2481, subd. 11. But the jury rules of evidence are not always of great consequence in this court, where errors not vital to the result are overlooked. Code Civ. Pro., § 2545; *Matter of Ross*, 87 N. Y. 514. When the former Ecclesiastical Courts, on which the procedure and juris-

diction of our probate courts were originally modeled, proceeded in purely ecclesiastical causes the rules of evidence were their own and founded on the civil law. 3 Burns Ecc. Law, 304. But in other causes in the Ecclesiastical Courts the common law courts compelled the Ecclesiastical Courts to admit such evidence as the common law allowed. *Evans v. Evans*, 3 Notes Ecc. Cas. 428. The tendency in the Ecclesiastical Courts was toward the common law rules of evidence after the "Reformation." *Groom v. Thomas*, 2 Hagg. 433. In the Surrogates' Courts of New York state no other rules of evidence than those prescribed by the common law have, I think, ever prevailed; although there is some authority for presuming that the rules of evidence recognized in the Court of Chancery were preferred to the rules of the common law courts. Other analogies offered by the testamentary common law are, however, still to be regarded in probate proceedings whenever both usage and statute are silent. *Martin v. Dry Dock, E. B. & B. R. R. Co.*, 92 N. Y. 70, 74; Code Civ. Pro. § 2481, subd. 11. The constitutional adoption of the former common law of New York as the ultimate rule in the present state means either this or nothing, and so Chancellor Kent held in respect of the procedure in our courts of equity. *Manning v. Manning*, 1 Johns. Ch. 527, 529. A late statute now reinforces this principle in this court. Code Civ. Pro., § 2481, subd. 11.

In the Ecclesiastical Courts recognized by the common law, and according to Coke himself part of the common law, when a paper was propounded as a will, and there was an allegation of a separate paper revoking the will, it was in the power of a judge of a Court of Probate to admit some of the papers and refuse probate to others. *Griffin v. Ferard*, 1 Curt. 97; *Fowlis v. Davidson*, 4 Notes Cases, Ecclesiastical Courts, 149; *Palmer v. Brown*, 7 id. 555. If we take into account the rigidity of the civil law pleadings in the former Ecclesiastical Courts these de-

cisions cited show a large latitude of authority in the probate judges of England. In *Hillam v. Walker*, 1 Hagg. 71, it was held that one who was not an executrix of a codicil according to the tenor had no standing to contest an earlier will. This shows that the codicil was to be first proved. The burden of proof was then on the persons propounding the codicil first to give evidence which entitled them to contest an earlier will. *Gibbens v. Cross*, 2 Addams, 455. The former practice on this point is now perpetuated in this jurisdiction by Rule IV of this court, which requires the controverted right of one desiring to dispute probate to be first determined by the surrogate. *Matter of Hamilton*, 12 N. Y. Supp. 708; *affd.* 76 Hun, 200. But even in the absence of this very explicit rule of court, bearing on this motion, the old practice would be of some account at the present day in the absence of modern authority or statute. The precedents in the Ecclesiastical Courts are always entitled in this court to consideration (*Betts v. Jackson*, 6 Wend. 173, 183; *Bevan v. Cooper*, 72 N. Y. 317, 329; *Tyler v. Gardiner*, 35 id. 559, 583), in the absence of modern authority or controlling statute. To my mind such precedents are sufficient to show that the surrogate as a probate judge is by the common law invested with a large discretion over the order of proof in a contentious probate proceeding, and that the order of proof on such proceeding is a part of the trial before the surrogate and addressed largely to such judicial discretion. Of course, he may err in this regard, and then the way to redress has been pointed out at some length in this opinion.

That there may at the present time be proper cases for a consolidation of separate proceedings to probate various testamentary papers of different dates made by the same testator, both the old and the modern precedents disclose. *Van Wert v. Benedict*, 1 Bradf. 114. Formerly the ecclesiastical judge could order all testamentary papers to be produced in court in a

proceeding to probate any one of them. Coote, Ecc. Practice, 472; Killican v. Lord Parker, 1 Lee, 662; Matter of Work, 76 Misc. Rep. 403, 408. This was tantamount to a consolidation at the present day. But the circumstances of a particular case must always indicate the proper procedure for that case, and the proper procedure rests largely in the discretion of the trial judge.

But whether I am correct or not concerning the probate practice in former times and at present, I am quite satisfied that the motion now before me is in the Surrogates' Court of this county addressed to the discretion of the surrogate presiding at the trial, and that this motion for an order regulating the procedure of the trial or the order of proof on the trial of a contested probate is premature, and not to be classed as Chambers business. I must therefore deny the motion.

Motion denied.

Matter of the Estate of NAPOLEON B. WICKWIRE, Deceased.

(Surrogate's Court, Erie County, March, 1913.)

**WILLS—CITATION FOR PROBATE—SUBSCRIBING WITNESSES—LEGACY—
APPLICATION TO SET ASIDE PROBATE—CODE CIV. PRO. § 2481 (6).**

Where upon the return of a citation for probate regularly issued the only heir and next of kin, testator's infant grandchild, appeared by her general guardian and, after the appointment of a special guardian and an adjournment, the testimony of the subscribing witnesses and also that of one of the executors named had been taken, and on an application made under section 2481 (6) of the Code of Civil Procedure to open and set aside the decree of probate on the sole ground that the testimony of the executor was incompetent as he was a legatee,

there is no evidence that the infant was wronged, but, on the contrary, that the decree for probate was entered after an agreement had been made whereby the infant's legacy was materially increased, and an accounting was had that was regularly passed upon, and the infant, on coming of age, and in court and under the supervision of her special guardian who had recommended that the will be admitted to probate, executed a release and received her legacy as agreed upon, the petition to set aside the decree will be denied, though it appears that neither of the subscribing witnesses was examined as to the mental capacity of testator and that the defect in proof was supplied by the executor who testified without objection.

APPLICATION to open and set aside decree of probate under section 2481, subdivision 6, of Code of Civil Procedure.

Nelson T. Barrett (Clark H. Timmermann, of counsel), for petitioner.

William G. Kilhoffer (Charles A. Hahl, of counsel), for executors.

HART, S.—The decree of probate in the above entitled proceeding was entered in this office September 26, 1900. The petition for probate set forth the only heir and next of kin to be Grace Von Cleaf, grandchild, an infant. Upon the return of the citation in August, the infant appeared by her general guardian, and a special guardian was also appointed to represent the infant. The proceeding was adjourned and the testimony of the subscribing witnesses was taken in open court, as was also the testimony of Irving D. Eckerson, who was named one of the executors in the will.

The present application for the opening of the decree is based on the admission of evidence of the witness Eckerson, alleging it to be incompetent because of his interest as a legatee. There is no evidence before me indicating that the former infant

has been wronged in any manner, or that her rights were not carefully protected; petitioner having rested on the pleadings and submission of the record.

The citation for probate was regularly issued; the infant not only appeared by general guardian, but had the advice and counsel of a special guardian. The decree of probate was signed by my predecessor in office after negotiation and investigation had been made, and an agreement was entered into whereby the infant's legacy was materially increased. Intermediate orders to show cause were had before this court, the infant always appearing by her general guardian, and whenever her rights were involved Judge Washburn appeared for her and was appointed special guardian. He filed with the court at the time of the entry of the decree of probate a verified report setting forth the result of his investigation and negotiations and also his recommendation that the will should be admitted to probate. An accounting was subsequently had, all of which, from an examination, of the papers on file, appear to have been regularly passed upon. The infant shortly after attaining her majority appeared in court, and under the supervision of Judge Washburn signed and acknowledged her release and received the legacy with accumulations as agreed upon previous to the entry of the decree probating the will.

I have examined the cases cited by counsel, and have read over the entire record in this estate. I find that neither of the subscribing witnesses was examined as to the mental capacity of testator, and that the witness Eckerson, without objection, supplied the defect. Why this was done there is nothing in the record to indicate. It has been established that the interest an executor might have in an estate, so far as commissions are concerned, would not disqualify him as a witness—the bequest to the witness is a legacy in lieu of commissions; but, without regard to this technicality, all parties in interest were in court

on the original citation; the special guardian is a man skilled in law and practice appertaining to probate practice, and, so far as I can ascertain, labored diligently, in behalf of his ward. I, therefore, can see no reason why the decree should be disturbed. Petitioner's application is, therefore, denied, without costs to either party.

Application denied, without costs.

**Matter of the Appraisal, under the Transfer Tax Law, of the
Estate of WILLIAM ALEXANDER SMITH, Deceased.**

(Surrogate's Court, Rockland County, March, 1913.)

**TAXES—TRANSFER TAX—BENEFICIARY OF A TRUST FUND—WILLS—
ESTATES IN REMAINDER WHEN TAXABLE—LIFE ESTATES SUBJECT TO
TRANSFER TAX.**

Where testator's son was a life beneficiary of a trust fund with power of disposition thereof by will, and testator's daughter, the life beneficiary of another trust fund, one-half of which on her death was bequeathed to her husband should he survive her, the remaining one-half to become a part of testator's residuary estate, was given a similar power of disposition of the whole trust fund in case she survived her husband, the life estates are presently subject to a transfer tax payable out of the residuary estate, but the estates in remainder are not subject to such a tax until the death of the respective life beneficiaries.

The question whether the tax on the estates in remainder is chargeable on the residuary estate, or upon the principal of the respective trust funds, which question involves a construction of the will, cannot be determined on the settlement of an order fixing the tax on the life estates, but must await an accounting when all parties in interest will be before the court and have an opportunity to be heard, or until a proceeding is taken to ascertain and impose the tax.

Under a clause of the will "that all the gifts, bequests,

devises and legacies hereinafter mentioned be paid, transferred or received in full (subject to any provisions for abatement hereinafter contained), and that all succession or transfer taxes imposed thereon, or on any of them, be paid out of my residuary estate," the taxes to be imposed on the estate in remainder constitute a charge on the residuary estate.

Under section 220 of the Tax Law as amended in 1910 and in force at testator's death, which provides: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," it is the exercise of the power of appointment and not the creation thereof which affects the transfer which the statute makes taxable; consequently the estates in remainder are not taxable until the time arrives for the exercise of the testamentary power of appointment conferred on the life beneficiaries.

APPEAL from order in transfer tax proceeding.

Emmet & Parish, for executor.

Lyman Ward, for Robert William Hobert Smith and Dinah W. Smith, residuary legatees.

Huntington, Rhinelander & Seymour, for Clara Hunter Stewardson and another, upon settlement of order.

McCAULEY, S.—An order was entered herein, upon the filing of the appraiser's report, assessing the transfer taxes presently payable upon this estate. An appeal was taken from the order by the executor and by two of the residuary legatees, and the questions raised by the appeal have been reviewed and determined.

The will creates two trust funds, namely, one of \$20,000 for the benefit of the testator's son, during his lifetime, with power of disposition by will; and one of \$100,000 for the benefit of his daughter, during her lifetime, one-half of which, upon the daughter's death, is bequeathed to her husband, if he survive her, the remaining one-half to become a part of the residuary estate; but, if the daughter survive her husband, a similar power of disposition of the whole trust fund is given to her.

The present value of the life estate of the son in the trust fund of \$20,000 was appraised at the sum of \$7,459; and the present value of the life estate of the daughter in the trust fund of \$100,000 was appraised at the sum of \$43,272. The appellants concede that these life estates are presently taxable, and that the taxes imposed thereon by the order appealed from are payable out of the residuary estate, by virtue of the first clause of the will. They also concede that the estates in remainder are not at present taxable, and will not be taxable until the death of the respective life beneficiaries; but they disagree as to the fund out of which the taxes when imposed must be paid, the executor's contention being that the residuary estate constitutes the fund chargeable with their payment, whereas the residuary legatees insist that they will be a charge upon and payable out of the principal of the respective trust funds.

I am asked, upon the settlement of the order to be entered upon the appeal, to determine this question, to the end that the order may contain the proper direction in the premises.

The question does not come within the purview of the appeal, and involves a judicial interpretation and construction of the first clause of the will. In my opinion the question cannot at this time be authoritatively determined; its consideration and decision should await an accounting, when all the parties in interest will be before the court, and afforded an opportunity to be heard, and when a judicial construction of the

will may be had; or until a proceeding is taken to ascertain and impose the taxes. In either proceeding this court would be clothed with authority to determine the validity and effect of the testamentary clause above referred to. *Matter of Ullmann*, 137 N. Y. 403.

I feel constrained to say, however, that in my opinion the taxes to be imposed upon these estates in remainder will constitute a charge upon and be payable out of the residuary estate. That the testator had the right to direct how or from what fund all succession or transfer taxes should be paid cannot be questioned. *Matter of Gihon*, 169 N. Y. 443; *Isham v. New York Assn. for Poor*, 177 id. 218.

The direction of the testator, as expressed in the first clause of his will, is "that all the gifts, bequests, devises and legacies hereinafter mentioned be paid, transferred or received in full (subject to any provisions for abatement hereinafter contained), and that all succession or transfer taxes imposed thereon, or on any of them, be paid out of my residuary estate."

This language is comprehensive, apt, and expressive, and, as it seems to me, admits of but one interpretation, namely, that the testator's intention was that all persons who take, whether immediately and directly under his will, or by the exercise of the power of appointment, should receive the gift or bequest without diminution through the imposition upon the transfer of any federal or state tax. The Tax Law as amended and in force at the time of the testator's death (Laws of 1897, chap. 284, § 220, as amd. by Laws of 1910, chap. 706) provides: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged ab-

solutely to the donee of such power and had been bequeathed or devised by such donee by will."

In construing this provision it has been held that it is the exercise of the power of appointment and not the creation of that power which effects the transfer which the statute makes taxable; and, consequently, that the remainder is not taxable until the time arrives for the exercise of the testamentary power of appointment conferred upon the life beneficiary. *Matter of Howe*, 86 App. Div. 287, and cases there cited; *Matter of Delano*, 176 N. Y. 486.

The cases upon which the learned counsel for the residuary legatees rely simply reaffirm this principle and are not in point. The question is merely one of interpretation. Did the testator intend, and so express himself in the first clause of his will, that the appointees, and ultimate beneficiaries, in the event of the exercise of the power of appointment, should receive the gifts or bequests in full and without diminution by reason of any succession or transfer tax that might be imposed thereon? We think he did.

If the power of appointment is exercised by the donees, or by either of them, their appointees will take through a source of title emanating from the will itself. In other words, title to the gifts or bequests will be transferred from the testator to the appointees and ultimate beneficiaries, through the exercise by the donees of the power of appointment.

The order submitted by the learned counsel for the executor is substantially correct, and with slight modification should be entered. The order may be settled and entered upon two days' notice.

Decreed accordingly.

KELLEL J. SHOGREY, Respondent, v. RAFOUL NASER, KAMEL KATEN and JOHN NAHASS, trading as NASER, KATEN & NAHASS, Appellants.

(Supreme Court, Appellate Term, First Department, March, 1913.)

DEPOSITIONS—BOOKS PRODUCED UNDER SUBPOENA DUCES TECUM—EXAMINATION BEFORE TRIAL—CONTEMPT.

Books produced under a *subpoena duces tecum* on the examination of a defendant before trial are only required to refresh his memory so as to render the examination effective; and where he finds an entry of an item seemingly relevant to the inquiry he is within his rights in refusing on advice of counsel to translate it, though directed so to do by the court, where he states that the entry does not refresh his recollection; and an order adjudging him in contempt for such refusal will be reversed.

APPEAL by the defendants from an order of the City Court of the City of New York adjudging one of them guilty of contempt of court.

Goodale & Hanson (Bert Hanson, of counsel), for appellants.

Wahle & Kringel (H. Lionel Kringel, of counsel), for respondent.

DELANY, J.—The order allowing the examination of defendants before trial was supplemented by a *subpoena duces tecum* in obedience to which defendants' books were produced in order to make the examination effective, inasmuch as the evidence desired could not in all likelihood be given except by the witness refreshing his recollection by reference to them. De-

fendant said he found an entry of an item seemingly relevant to the inquiry but stated that it did not refresh his recollection. The entry was in the Arabic language and counsel for the plaintiff requested the defendant to translate it; but the defendant refused. The court then directed the defendant to translate it but, on advice of counsel, the defendant again refused. The court thereupon adjudged the defendant guilty of contempt. This appeal is taken from that order.

We think that the defendant was justified in refusing to answer because the defendant was within his rights. The question was in effect an effort at inspection and discovery of defendants' books and not one incidental or proper to the examination of a party before trial, under section 872 of the Code. *Rosenbaum v. Rice*, 36 Misc. Rep. 410; *Bloodgood v. Slayback*, 62 App. Div. 315.

It has been held by practically the entire trend of judicial decisions that the books produced on such examination are only required to refresh the memory of the witness so as to render this examination effective but not for the purpose provided under sections 803—809 of the Code of Civil Procedure. *Matter of Thompson*, 95 App. Div. 542; *Boeck v. Smith*, 85 id. 575.

The plaintiff in a proper case shown may have the right to inspection of the books, but such was not within the purview of the order under which this examination was taken, and plaintiff was without right therefore to secure it by indirection.

Order reversed, with ten dollars costs and disbursements.
LEHMAN and GERARD, JJ., concur.

Order reversed.

In the Matter of the Estate of LOISSE MARIE BOUK, Deceased.

(Surrogate's Court, Saratoga County, March, 1913.)

**WILLS—LEGACY OF AMOUNT DUE ON BOND AND MORTGAGE IS SPECIFIC—
EXECUTOR AS LEGATEE IN TRUST UNDER RESIDUARY CLAUSE.**

A bequest, in trust, to the executor of the amount due on a bond and mortgage held by testatrix on her mother's farm, directed that the amount thereof should be kept intact during the life of the father of testatrix, the income collected annually, or allowed to remain uncollected, as the executrix might deem advisable to the extent that it was not needed for the support, care and maintenance of the father, and the executor was directed to collect and use so much of the income as he might deem proper and necessary for the father's use and benefit and to invest any amount collected and not used at his death, or at the death of testatrix if she survived him, and to give the principal sum and any income invested to the brother of testatrix, or in case of his death to his lawful issue, if any, and in case he left none the same was to be paid to the children of the sister of testatrix, share and share alike. By agreement with the mortgagor, testatrix, the day after making her will, indorsed thereon \$2,986.05, the sum fixed as the amount unpaid on the mortgage. The mortgagor devised the mortgaged premises to her son who, with his sister, the testatrix herein, contributed to the support of their father until his death. Thereafter, the son in satisfaction of said mortgage gave to testatrix a new one for \$3,600, but the interest paid thereon by him from time to time was not kept apart, intact, in any separate fund by testatrix who also deposited in her general bank account the sum of \$4,039.12 paid to her in satisfaction of the last named mortgage. The residuary clause of the will of testatrix herein who never was married provided:

"I give, devise and bequeath to my Executor hereinafter named in trust all the balance, rest, residue and remainder of my estate of all kinds both real and personal wheresoever situated to use the income thereof as he deems advisable for the benefit of the children of my said sister * * * until the youngest becomes twenty one years of age at which time and as soon as practicable thereafter my Executor is to divide the amount so given him by this * * * clause of my will, between the issue of my said sister * * *

share and share alike, if any of my said sister's children die before the youngest shall arrive at 21 years of age, leaving lawful issue which survive at the time the youngest child of my said sister shall arrive at 21 years of age, the issue of such deceased child to take the part of the property devised by this * * * clause of my will, the same as its parent would take if living."

Upon the judicial settlement of the accounts of the executor, held, that the bequest in trust of the amount due on the bond and mortgage held by testatrix against her mother was specific in character and became adeemed before the death of testatrix herein; that the executor took in trust under the residuary clause and that nothing was left as unbequeathed assets.

PROCEEDING upon the judicial settlement of the account of an executor.

William A. Mehan, for executor.

Butler & Kilmer, for Jacob Bouk, Jr.

Leary & Fullerton, for Eliza J. Baker.

OSTRANDER, S.—February 17, 1892, Loisse M. Bouk made her will, by the 12th clause of which she provided as follows:

"12th. I give, devise and bequeath to my Executor hereinafter named the amount due on the Bond and Mortgage I hold on my Mother's Farm in Cabery, Ford Co., Ill., in trust said amount to be kept intact during the life of my Father the income thereof collected yearly or allowed to remain uncollected as my Executor shall deem it advisable to the extent said income is not needed by said Executor to use for the support, care and maintenance of my Father, and my Executor is hereby directed to collect and use so much of said income as he shall deem proper and necessary for my said Father's use and benefit and any amount collected and not used, invest, the same as the principal, at the death of my Father or at my death if

I should survive my Father. I direct my Executor hereinafter named to give the said sum and any of the income so invested to my brother Jacob Bouk, Jr., or in case of his death to his lawful issue if any survive if said Brother has no lawful issue then surviving to the children of my sister Eliza J. Baker, share and share alike."

The mortgage in question was made September 28, 1876, by Lydia Bouk, mother of the testatrix, for \$1,750 and interest. On the day after the will was made, an agreement between Lydia Bouk and the testatrix was indorsed on the mortgage, fixing the amount unpaid on the mortgage at \$2,986.05.

On April 5, 1892, Lydia Bouk died, devising the mortgaged premises to Jacob Bouk, Jr.

Jacob Bouk, Sr., was seventy-five years old and feeble. The testatrix and Jacob Bouk, Jr., contributed to his support until he died in July, 1892.

March 28, 1896, Jacob Bouk, Jr., gave to testatrix in satisfaction and in place of the Lydia Bouk mortgage a new mortgage for \$3,600. Interest on this mortgage was paid from time to time by Jacob Bouk, Jr., to testatrix, and was not kept apart, intact, in any separate funds by the testatrix.

January 26, 1907, Jacob Bouk, Jr., paid to the testatrix \$4,039.12 in satisfaction of the last named mortgage. When said mortgage was paid the testatrix deposited the avails of it in her general bank account with other funds.

May 6, 1911, the testatrix died and later her will of February 17, 1892, was proved and recorded as her last will and testament. The testatrix was never married. By the 16th clause of her will testatrix provided:

"16th. I give, devise and bequeath to my Executor hereinafter named in trust all the balance, rest, residue and remainder of my estate of all kinds both real and personal where-soever situated to use the income thereof as he deems advisable

for the benefit of the children of my said sister Eliza J. Baker until the youngest becomes twenty-one years of age at which time and as soon as practicable thereafter my Executor is to divide the amount so given him by this the 16th clause of my will, between the issue of my said sister Eliza J. Baker share and share alike, if any of my said sister's children die before the youngest shall arrive at 21 years of age, leaving lawful issue which survive at the time the youngest child of my said sister shall arrive at 21 years of age, the issue of such deceased child to take the part of the property devised by this the 16th clause of my will, the same as its parent would take if living."

From the inventory filed in the estate of the testatrix it appears that she had cash on her premises, five dollars and sixty-five cents, cash in bank seventeen dollars and twelve cents and various securities, merchandise and household goods. But it is impossible to identify any of her estate as the proceeds of the Jacob Bouk, Jr., mortgage, and it is apparent that the testatrix never kept this fund intact as a separate fund.

Was this legacy given by the 12th clause specific or demonstrative? If specific, it is conceded that the legacy was adeemed in the lifetime of the testatrix. A specific legacy is a bequest of a specified part of a testator's personal estate as distinguished from all others of the same kind. A demonstrative legacy is a bequest of a certain sum of money, stock or the like payable out of a particular fund or security. A bequest of the proceeds of a certain bond and mortgage is specific, while the bequest of \$1,500 payable out of the proceeds of a specified bond and mortgage is a demonstrative legacy. A demonstrative legacy differs from a specific one in the particular that if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate. *Crawford v. McCarthy*, 159 N. Y. 514.

The first question is what intent was in the mind of the tes-

tatrix. This we must gather from the language of her will, and, if the language be uncertain, then the circumstances surrounding the transaction may shed light upon the question.

In construing such legacies the courts have frequently found great difficulty in determining whether the testator intended to give the specific security, or a sum equal to the nominal amount of such security. But, inasmuch as the presumption is that the testator intended a real benefit to the legatee, courts consider legacies as general or demonstrative rather than specific where the language of the will permits that construction. *Giddings v. Seward*, 16 N. Y. 365-367.

In *Walton v. Walton*, 7 Johns. Ch. 258, Chancellor Kent says, page 263: "The Courts are so desirous of construing the bequest to be general, that if there be the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund *only*, as that out of which he meant it to be paid, it shall be construed pecuniary, so that the legacy may not be defeated by the destruction of the security."

But he continues after citing among other cases that of *Fryer v. Morris*, 9 Ves. Jr. 360, where the testator gave "the sum or sums of money which his executors might receive on a note of 400 pounds," all these legacies are specific and a receipt of the money by the testator is an ademption of the legacy. And he says, page 264, that the reasoning is that "if the legacy is meant to consist of the *security* it is specific, though the testator begins by giving the sum due upon it."

In this 12th clause the bequest is of "the amount due on the bond and mortgage I hold on my mother's farm," etc., to be kept intact during the life of my father, and so much of the income as necessary paid for the father's support—the balance of the income to be added to the principal. If the father survived her, then at his death, or if she survived the father, then at her death, she directs her executor "to give the said

sum and any of the income so invested" to her brother Jacob Bouk, Jr.

Though no specific sum is named as the amount due on the bond and mortgage, it is argued that an amount which can be made certain is certain, and that the amount intended to be given was \$2,986.05 which was found unpaid on the mortgage at the settlement between testatrix and her mother on the day after making the will. But at the death of testatrix nothing was due on this mortgage.

It will be noted that the bequest is not of an amount equal to the amount due on the mortgage, but of the amount due on it.

She gives directions for the accumulation of the income of this particular fund—not needed for her father's support and addition thereof to the principal. And at his death, or hers, if she survive the father, "the said sum and any of the income so invested," to her brother Jacob Bouk, Jr. These references are all to the particular fund and the income from it and not to a general fund of that amount.

After her father's death and her brother became able to pay off this claim she accepted the payment, discharged the claim and no longer kept the fund intact.

There is no substantial difference between "the amount due" on a specified security and "the proceeds" of that security as in *Gardner v. Printup*, 2 Barb. 83. Nor does the language under consideration differ materially from that used in *Fryer v. Morris*, *supra*. The legacy is strictly limited to the amount due on this security and does not in any other terms refer to any sum of money.

The will speaks as of the time of the death of testatrix and she then held no mortgage on her mother's farm and there was no amount due on such mortgage. The mortgage was to be dealt with during her life and income added to it.

In the 14th clause of her will she bequeaths certain bridge stock and gives directions for the payment of an equivalent amount in case the stock should have been disposed of by her in her lifetime. This shows that she knew the principles of ademption.

I think the legacy was specific in character and became adeemed before the death of the testatrix.

It is with regret that I reach this conclusion since it leaves her only brother, Jacob Bouk, Jr., with whom she was apparently friendly, without any substantial recognition in her will.

The next question upon which the executor seeks direction is whether the portion of the estate adeemed, as aforesaid, falls into the residuary estate provided for in article 16 of her will, or whether it is to be disposed of as unbequeathed assets, to her next of kin.

By the first ten articles of her will, the testatrix bequeaths various personal effects to divers persons, and provides for the purchase of cemetery lots and headstones for herself, her father and mother. By the 11th clause she provides:

"11th. I give, devise and bequeath all my stock, fixtures and articles kept by me in business, also all money, evidences of debt and securities of all kinds, both real estate and personal property wherever situated not hereinbefore specific devised to my Executor hereinafter named in trust for the following uses and purposes:"

By the 12th, 13th, 14th and 15th clauses she bequeathed to her executor in trust various sums and properties in trust for various persons, being an enumeration of the trusts upon which the property mentioned in the 11th clause was given.

By the 16th clause she provides:

"16th. I give, devise and bequeath to my Executor hereinafter named in trust all the balance, rest, residue and re-

mainder of my estate of all kinds both real and personal wheresoever situated to use the income thereof as he deems advisable for the benefit of the children of my said sister Eliza J. Baker, until the youngest becomes twenty-one years of age, at which time and as soon as practicable thereafter my Executor is to divide the amount so given him by this the 16th clause of my will between the issue of my said sister Eliza J. Baker share and share alike, if any of my said sister's children die before the youngest shall arrive at 21 years of age, leaving lawful issue which survive at the time the youngest child of my said sister shall arrive at 21 years of age, the issue of such deceased child to take the part of the property devised by this the 16th clause of my will, the same as its parent would take if living."

This is the real residuary clause in the will.

In *Morton v. Woodbury*, 153 N. Y. 243, 254, Judge Martin writing for the court quotes from Judge Gray in *Riker v. Cornwell*, 113 N. Y. 115, as follows: "I think the doctrine is firmly established, by the reported cases and by the text books, that where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accidents."

Judge Martin also quotes with approval from Judge Andrews in *Lamb v. Lamb*, 131 N. Y. 227, 235: "But where the language of a residuary clause is ambiguous, the leaning of the courts is in favor of a broad rather than a restricted construction.

Applying this doctrine to the present case I think that the executor takes, in trust, as residuary legatee, under the 16th clause, and that nothing was left as unbequeathed assets. *Banks v. Phelan*, 4 Barb. 80, 91; *King v. Woodhull*, 3 Edw. Ch.

79; Kerr v. Dougherty, 79 N. Y. 327; Matter of Benson, 96 id. 499; Carter v. Board of Education, 144 id. 621; Matter of Miner, 146 id. 121; Matter of Barrett, 132 App. Div. 134; King v. Strong, 9 Paige, 94.

Decreed accordingly.

Matter of the Final Accounting of CHRISTIAN KLEIN, as Executor, etc. of MINNIE A. KLEIN, Executrix of the Last Will and Testament of CLARA J. KAISER, Deceased, of her Proceedings as the General Guardian of the Person and Property of RAYMOND E. WESTERMAN, Deceased.

(Surrogate's Court, Oneida County, April, 1913.)

GUARDIAN—GENERAL—INFANTS—ACCOUNTING BY GUARDIAN.

Where money belonging to an infant was applied by his general guardian to her personal use, her estate is chargeable with the amount so applied, less the expense of her appointment.

Where, by her son's will, such guardian was bequeathed all his interest in certain real estate on condition that she should take care of his son until he became of age, it was the guardian's duty, having qualified as executrix, to care for and maintain her infant grandson, and a charge for his board and maintenance cannot be allowed on her accounting for his money which she had illegally expended for her own use.

FINAL ACCOUNTING of an executor as general guardian, etc.

Henry F. & James Coupe, for executor, Christian Klein.

Walts & Young, for John G. Ludwig, as general guardian of Raymond E. Westerman, minor.

Geo. E. Dennison, special guardian for Raymond E. Westerman, minor.

SEXTON, S.—On August 6, 1906, Clara J. Kaiser was appointed general guardian of the person and property of Raymond E. Westerman, an infant, and on August 5, 1907, died without having accounted.

January 24, 1908, Minnie A. Klein was appointed general guardian of said infant, and died on March 29, 1910. She never accounted.

November 3, 1911, John G. Ludwig was appointed general guardian of said infant and petitioned for a compulsory accounting in the estate of said Clara J. Kaiser of her proceedings as general guardian of the person and property of said infant. Thereafter, Christian Klein, as executor of the estate of Minnie A. Klein, who was executrix of the estate of Clara J. Kaiser, took proceedings for a voluntary accounting, and cited the bondsmen of said Clara J. Kaiser and said minor to attend said accounting. On the return of the citation in said proceedings, the said John G. Ludwig, as general guardian of said infant, filed objections to the account as filed by said Christian Klein.

The issues made by the objections were tried. It appears that Frederick Westerman was insured in the Maccabees in favor of his infant son, Raymond E. Westerman, in the amount of \$1,000. He died July 17, 1906. Clara J. Kaiser as the general guardian of said infant, Raymond E. Westerman, received said sum and deposited the same in the Utica Savings Bank on August 24, 1906. It is conceded that said guardian used \$717.81 of said sum to change a barn on her land into a house. Receipts for this amount were produced.

The bank records clearly establish that \$950 of said \$1,000 was drawn from the bank by said Clara J. Kaiser, as said gen-

eral guardian. No order therefor was obtained from any court. There should be deducted \$15, the expense of her appointment. There seems to be no question but that the sum of \$935 was used in converting a barn, the property of said Clara J. Kaiser, into a house. It is insisted by the present guardian of said infant that such use of said infant's money was unauthorized and illegal, and that the estate of said Clara J. Kaiser should be charged with said amount.

Section 85 of the Domestic Relations Law provides: "A guardian holding trust funds for investment has the powers provided by section one hundred and eleven of the decedent estate law for an executor or administrator."

Said section 111 of Decedent Estate Law provides: "An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein," etc.

Savings banks under section 146 of the Banking Law are not authorized to invest deposits in real estate, and can only deal in real estate as provided by the exceptions set out in section 147 of said Banking Law, which does not include a transaction of the character under consideration.

It has been held that a guardian cannot invest funds of his ward in a mortgage upon property of his own, which he conveyed to the ward's father after the receipt of the said funds, and, if the mortgage subsequently proves to be an insufficient security, the ward may repudiate the transaction and recover the amount of the funds. *Matter of Terry*, 31 Misc. Rep. 477.

"Where a guardian advances money out of his own pocket, for the erection of buildings upon the land of his ward, without the order of a court of equity, he cannot recover the amount from his ward." *Hassard v. Rowe*, 11 Barb. 22; *Copley v. O'Neill*, 57 id. 299.

"A guardian of an infant cannot contract for an exchange of real estate of the minor, nor can the minor, by any act of his, ratify any such contract. It is absolutely void, and an action to compel a specific performance of it cannot be maintained." *Bellinger v. Roatstone*, 6 Wkly. Dig. 69.

In *Matter of Bolton*, 159 N. Y. 129, it was held: "The Surrogate's Court has no authority to direct a conversion of an infant's property from personalty into realty, by which the infant will be bound on attaining majority, or by which the devolution or disposition of the property will be bound in case of the infant's death under age. * * * The investment of a small part of the personal property of a minor, married and keeping house with her husband, in the purchase of a suitable dwelling house to be used as a residence for herself and family, made by her general guardian at her request and pursuant to an order of the surrogate, does not change the money so invested from personal property into real estate, with reference to the statutes of descents and distributions. * * * It is needless to add that the general guardian had no power to buy real estate with the personal property of his ward, of his own motion and without the direction of any court."

It is urged by the accounting party that said Clara J. Kaiser, having by her will made certain provisions for the minor, it was her intention thereby to restore to him, in property value, the amount used by her in remodeling said barn.

If she had such an intention, she failed to make it effective by the provisions of her will. By that instrument she gave all of her property to her daughter, Minnie A. Klein, and to said infant, Raymond E. Westerman, to be divided equally between them, share and share alike.

The third provision of her will provides: "In case of the death of my said beloved grandchild, Raymond E. Westerman, before he arrives at the age of 21 years, the share of my estate

and property given to him, shall go and belong to my daughter, Minnie A. Klein, absolutely and forever."

The will appointed Minnie A. Klein sole executrix with full power and authority to sell all of the real estate belonging to the testator, and also appointed said Minnie A. Klein trustee of the property given said infant until he attained the age of twenty-one years. After a careful perusal of the will of said Clara J. Kaiser, I am convinced that by no process of mental gymnastics can a reasoner reach the conclusion that the testatrix, at the time of the making of said will, had in mind the \$1,000 which she held as guardian, belonging to said infant, or intended by said will to do more than to add to the infant's estate the portion provided for him by her said will in the event of his attaining his majority.

The construction urged by the accounting party cannot be placed on said will, and should not be, because the provision therein was subject to be defeated by the death of the infant before his majority. The \$1,000 that he had absolute title to, which would pass to his heirs upon his death, rest upon a secure foundation, and a gift by will, depending upon the continuance of life for a number of years, could not be substituted therefor.

The accounting party concedes that Clara J. Kaiser received said \$1,000, then credits her estate with \$960 for board of the infant from July 23, 1906, to August 5, 1907, at \$3 per week, and \$15, the expense of her appointment as general guardian. This credit is objected to and cannot be allowed for the reason that Frederick Westerman, by his will probated August 6, 1906, bequeathed unto Clara J. Kaiser all his interest in the real estate known as No. 142 Albany street and 215 Jefferson avenue, upon the condition that she would take care of his son, Raymond E. Westerman, until he became of age. Clara J. Kaiser was named as executor in the will, procured the same to be probated, took letters and accepted its terms. It thereupon

became her duty, in consideration of having accepted the provisions of said will, to comply with the requirements thereof as to the care and maintenance of said infant.

It follows from the facts presented that the estate of Clara J. Kaiser should be and the same is hereby charged with the \$935, illegally expended by her, as general guardian, out of said insurance money belonging to said infant, together with interest thereon from October 1, 1906, at three and one-half per cent.

It appears that Minnie A. Klein received fifty dollars from the estate of Clara J. Kaiser, belonging to said infant, and that she was his general guardian for a time, and his trustee under the will of Clara J. Kaiser; still her acts in either of said capacities cannot be inquired into in this accounting, which deals only with the acts of said Clara J. Kaiser, as general guardian of said infant.

No funds or property of the estate of Clara J. Kaiser, as general guardian of said Raymond E. Westerman, having actually come to the hands or into the possession of said accounting party, Christian Klein, a decree may be entered passing his account as modified by this decision.

Decreed accordingly.

**Matter of the Final Judicial Settlement of the Account of
GEORGE SANDHUSEN, as Testamentary Trustee of the Last
Will and Testament of HERMAN VOSS, Deceased.**

(Surrogate's Court, Kings County, April, 1913.)

WILLS—RESIDUARY CLAUSE—TRUSTS—DISTRIBUTION OF TRUST FUNDS.

Where by a will containing no residuary clause the executors were given certain personal assets in trust to invest and pay the income to testator's sister during her life, with direction that at her death the estate was to be divided into as many equal shares as the sister left children, and that each be paid his share on reaching the age of twenty-one years, upon the death of the sister leaving no children her surviving there arises an intestacy as to the principal of the trust, distribution of which must be decreed accordingly.

PROCEEDING upon the final judicial settlement of the account of a testamentary trustee.

John E. Bullwinkel, for accountant:

J. Fred Alsgood, for heirs and next of kin.

James & Thomas H. Troy (James Troy, of counsel), for Hetty Meyer.

Charles K. Terry, special guardian.

KETCHAM, S.—In the will under which this account is made there is a gift of personal assets to the executors, in trust, for the following purposes:

“A. To invest the same * * * and to pay to my

sister, Anna Louise Steffens * * * all the income of my estate during her natural life.

“B. Immediately after the death of my said sister, to divide my estate into as many equal shares as my said sister leaves children, and to pay to each of them their share or moiety as they respectively arrive at the age of twenty-one years.”

There is no residuary clause.

Anna Louise Steffens, named in the quotation *supra*, died after the testator, having had children, but leaving none surviving her.

The question is presented, whether the gift to the children of Anna Louise Steffens was, as to each of such children, vested upon the testator's death or was contingent upon survival of such children at the time of the mother's death.

If the gift over was to a class, it was future and contingent.

“Where final division and distribution is to be made among a class, the benefits of a will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made.” This expression, found in *Matter of Baer*, 147 N. Y. 348, is adopted in *Salter v. Drowne*, 205 id. 204.

Where, in a trust, the only gift over upon the death of a life beneficiary is contained in a direction to divide and the division is to be made among such children of a person named as shall survive their parent, there is presented with unusual distinctness a direction to divide among a class.

“A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number.” *Matter of Kimberly*, 150 N. Y. 90, 93.

A provision sufficiently like the one now under examination,

but less favorable to the claim of a vesting of the remainder, is considered by the Appellate Division of the first department in *Cammann v. Bailey*, N. Y. L. J., April 12, 1913, and is there construed to intend a contingent remainder only.

That the shares to be paid to the children of Mrs. Steffens are called "their share" gives no color to the contention that any share vested in any child at the testator's death, for if without recourse to the words last quoted the only division intended by the will was one by which "shares" should be distributed among surviving children, the words "their share" would receive ample meaning if referred to the shares which would reach the children found to be entitled. *Cammann v. Bailey*, *supra*.

Upon the death of the life tenant, leaving no children, intestacy results as to the principal of the trust, and the decree of distribution should be made accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of JOSEPH FRITSCH, One of the Executors of the Last Will and Testament of EMMA FRITSCH, Deceased.

(Surrogate's Court, Kings County, April, 1913.)

**WILLS—BEQUEST OF CERTAIN WEEKLY SUM TO HUSBAND FOR LIFE—
POWER OF SALE—EXECUTORS AND ADMINISTRATORS—WHAT INTEREST
PASSES BY WILL.**

Where testatrix bequeathed a certain weekly sum to her husband for life, and the clause by which all the rest, residue and remainder of the estate, both real and personal, was given to her four children share and share alike, provided: "Should either of the said children die then his or her share to go to the survivor or survivors, but said

children shall only have the interest of their share or shares until they are twenty-one years of age, and they then shall receive the share or shares due them," and the executors were given a discretionary power to sell any of the real estate, but such sale, if possible, not to be made until the youngest child became twenty-one years of age, there is nothing in the will from which a trust may be implied.

The only duty of the executors with regard to the weekly payment to the husband of testatrix, which was but a legacy, was to arrange for its fulfillment so far as the personal estate might serve, or, under the power of sale, to apply thereto the proceeds of any property sold.

Where one of the residuary devisees died after one piece of testator's real estate had been sold, he died possessed of an interest in the proceeds of such sale as personalty, and such interest passed by his will.

PROCEEDING upon the judicial settlement of the accounts of an executor.

Nicholas Dietz, for accountant.

Daniel L. Donovan (William S. Butler, of counsel), for William S. Butler, as executor of Katherine E. Fritsch, deceased, and for Dorothy C. Fritsch.

George R. Holahan, Jr., special guardian for Karl Otto Fritsch and Joseph F. Fritsch.

Arthur L. Hurley, special guardian for Emily Fritsch.

KETCHAM, S.—This account is made under a will which is in part as follows:

"First. After my lawful debts are paid I give devise and bequeath unto my beloved husband Joseph Fritsch the bakery and baking business at No. 548 4th Avenue, in the Borough of Brooklyn, N. Y. and I also give, devise and bequeath unto my

said husband the weekly sum of Twelve Dollars as long as he lives and after his death it is to cease, such weekly sum to begin after my death.

"Second. All the rest, residue and remainder of my estate, real and personal, wheresoever the same is or may be and whatsoever the same shall consist of unto my four children, namely Katherine E. Fritsch, Emily C. Fritsch, Karl Otto Fritsch and Joseph F. Fritsch, share and share alike. Should either of the said children die then his or her share to go to the survivor or survivors, but said children shall only have the interest of their share or shares until they are twenty-one years of age, and they then shall receive the share or shares due them.

"Third. I give my executors hereinafter named or those qualifying full power and authority at their discretion and when to the best advantage of my estate to sell and dispose of my real estate and give good and sufficient deed or deeds therefor, but if possible not to sell the same or any of my real estate until my youngest child is 21 years of age.

"I hereby appoint my husband Joseph Fritsch and my friend John C. Kinkel, to be Executors of this my Last Will and Testament."

There is nothing in this will from which a trust can be implied. There is no direction that the executors shall have anything to do with the real estate except to sell the same; nor is there any direction that they shall do anything with the personal assets beyond the ordinary conduct of the administration.

In all the cases where a trust has been implied there were duties imposed upon persons named, the performance of which rendered "the possession by them of the estate convenient and reasonably necessary." *Cochrane v. Schell*, 140 N. Y. 516; *Ward v. Ward*, 105 id. 68; *Morse v. Morse*, 85 id. 53; *Tobias v. Ketchum*, 32 id. 319; *Jewett v. Schmidt*, 83 App. Div. 276; *Raymond v. Rochester Trust & Safe Deposit Co.*, 75 Hun, 239;

United States Trust Co. v. Maresi, 38 Misc. Rep. 539; Tallman v. Tallman, 3 id. 465.

The rule derived from all of these cases, in its simplest statement, is that when the "duties imposed are active and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties to the same extent as though declared to be so by the most explicit language." For this declaration see *Ward v. Ward, supra*.

The provision for the weekly payment to the husband is but a legacy or series of legacies in no respect differing from the ordinary gift of money, except with regard to the time of payment. As to this provision, the only duty of the executor is to arrange for its fulfilment so far as the personal estate shall serve or, under the power of sale, to apply thereto the proceeds of any property sold.

One of the residuary legatees has died since the testator, leaving a will made by him when he was between the ages of eighteen and twenty-one years. It is claimed in his behalf that an equitable conversion of the land resulted from the power of sale and that the will of the deceased devisee, since it was valid as to personalty, carries his interest in the lands which were subject to the power.

One piece only of the real estate of which the testatrix died seized has been sold, and this was sold before the death of the legatee last referred to.

There is in this will no imperative power of sale and, therefore, no equitable conversion of the lands. There was an actual conversion into personalty of the land which was sold. The deceased residuary devisee, therefore, died possessed of an interest in the proceeds of this sale as personalty and such interest passes by his will.

It cannot be said that upon his death his share went to his

"survivors," since the provision in the will with respect to the children named as residuary legatees must, in the absence of qualification, be referred to a death contemplated as taking place in the lifetime of the testatrix.

The account should be reformed so as to exclude therefrom all items with respect to any real estate except the house which was sold.

Decreed accordingly.

Matter of the Appraisal of the Estate of PERRY CHURCH, deceased, Under the Acts in Relation to Taxable Transfers of Property.

(Surrogate's Court, Orleans County, April, 1913.)

TAXES—TRANSFER TAX—WILLS—VALUE OF WIDOW'S DOWER.

Where, after a devise of certain real estate to a stranger to the blood, testator devised and bequeathed to his wife all the rest, residue and remainder of his property, both real and personal, in fee simple absolute forever, and with no express declaration that such provision was to be in lieu of dower, on the appraisal of the estate for the purposes of a transfer tax the value of the widow's dower in all the real estate of which testator died seized should be fixed and deducted.

APPEAL from an order fixing and assessing the transfer tax.

Harold A. Blake, for state comptroller, appellant.

Gerald B. Fluhrer, for Charles M. Church, executor, respondent.

Downs, S.—Perry Church, died a resident of the county of Orleans on the 26th day of May, 1912, leaving a last will and testament which was duly admitted to probate on the 22d day of July, 1912. A proceeding was thereafter commenced for the assessment of a transfer tax upon said estate and upon the report of the appraiser an order was made and entered fixing the transfer tax upon the property of said decedent.

The comptroller has appealed from such order upon the ground that the assessment of said tax was erroneous in that the appraiser in determining and fixing the amount thereof has deducted therefrom the value of the widow's dower in all of the real property of which her husband was seized at the time of his death.

No question is raised upon this appeal as to the rule well recognized that dower does not pass by the will and is, therefore, not subject to transfer tax. This principle is clearly enunciated in *Adsit v. Adsit*, 2 Johns. Ch. 448; *Lewis v. Smith*, 9 N. Y. 502; *Tobias v. Ketchum*, 32 id. 319; *Vernon v. Vernon*, 53 id. 357.

The appellant contends, however, that in this particular case the terms of the will are inconsistent with a claim of dower and that the widow must either take under the will or elect to take dower.

The courts of this state in a long line of decisions hold that the right of a widow to dower in her husband's lands is absolute and that no provision in a will for the benefit of the widow will be deemed to be taken in lieu of dower unless there be an express declaration to that effect or unless upon the face of the will there be a clear manifestation of the intent of the testator that the widow shall not take both. *Kimbel v. Kimbel*, 14 App. Div. 570; *Purdy v. Purdy*, 18 id. 310; *Konvalinka v. Schlegel*, 104 N. Y. 125.

The will of Perry Church, so far as material in this pro-

ceeding, is as follows: "*Second.* I give, devise and bequeath to Margaret Armour, of the town of Ridgeway, Orleans County, N. Y., the Ridgeway farm consisting of about forty-four acres in the town of Ridgeway, Orleans County, N. Y. and now occupied by said Margaret Armour, and also a farm north of Ridgeway Corners in the town of Ridgeway, Orleans County, N. Y., consisting of about sixty-two acres and known as the Hunt place; the said two places being hereby devised to said Margaret Armour in fee simple absolute. *Third.* I give, devise and bequeath to my wife Rosetta Church, all the rest, residue and remainder of my property, both real and personal, of whatever kind, name or nature, and wherever situate, and not hereinabove devised, in fee simple absolute forever."

There being no express declaration that the provision for the widow shall be in lieu of dower, the only question which presents itself is whether or not the above provisions are inconsistent with a claim of dower and whether or not the general scheme of the will is defeated if the widow be allowed to take her provision both under the will and dower.

In *Konvalinka v. Schlegel*, *supra*, the court says: "The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee * * * the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will."

Appellant claims that the intent of the testator that his widow shall not claim both the provision and dower is shown by the use of the words "fee simple absolute." I am unable to see the force of any such contention. I believe the testator in using the above words intended to convey all of the estate which he had in the property so devised and that the words are

used merely as descriptive of the tenure of the estate. Section 31 of the Real Property Law defines a fee simple absolute as an estate of inheritance not defeasible or conditional. As used in this will, the effect is to convey the whole of the estate which the testator had in the lands conveyed.

It cannot be claimed that the same words could not have been used had there been a mortgage upon the two parcels of land devised in the second paragraph or any other incumbrance. The dower right is a lien and the wife is entitled to its benefits. The dower right was not the testator's to give any more than any other incumbrance. *Closs v. Eldert*, 30 App. Div. 338.

Inasmuch as the terms of this will are consistent with a claim of dower by the widow, the appraiser did not err in deducting the value of such dower in fixing the tax to be assessed. The order should be affirmed.

Order affirmed.

Matter of the Application for Limited Letters of Administration on the Goods, Chattels and Credits of CARLO GRANDE, Deceased.

(Surrogate's Court, Columbia County, April, 1913.)

HUSBAND AND WIFE—MARRIAGE BY RELIGIOUS CEREMONY—LEGITIMACY OF CHILDREN—EXECUTORS AND ADMINISTRATORS.

In 1889 decedent and one R. were united in a so-called marriage by a religious ceremony, performed by a Catholic priest in Italy at a time when only civil marriages were valid, and the parties lived together as man and wife for a year, during which time he introduced her as his wife to various people and treated her as such. About a year after said marriage he came to America, and thereafter his wife, with her six-months-old child born in Italy, came

to this country and she and decedent lived together as husband and wife with her father and mother to whom, and others, decedent stated that R. was his wife and that the child was his daughter. Seven months later the wife eloped taking the child with her and returned to Italy where she has since lived and has had one child by the man with whom she eloped. The daughter, who from the time she was nine years of age had kept up a correspondence with her father, came to America in 1908, at his request, lived with him for three months and after spending a like time with her maternal grandmother returned to her father with whom she resided until her marriage. In February, 1904, decedent was married in Italy in accordance with the laws of that kingdom and several months thereafter he and his second wife came to this country where they resided and lived together as man and wife until his death, when his wife petitioned for limited letters of administration, and on the return of the citation his daughter appeared in person and admitted all the allegations of the petition except that petitioner was the widow of decedent and that she, the contestant, was not the daughter of decedent.

Held, that it must be presumed that decedent and his first wife interchanged matrimonial consents after arriving in this country; that they then and there became husband and wife, and that the contestant was thus legitimized; that contestant having failed to prove by the testimony of the first wife that no divorce had been obtained from her after her elopement the presumption was that the first marriage was legally dissolved prior to the marriage of decedent with petitioner, and that she was entitled to letters of administration as prayed for.

APPLICATION for limited letters of administration.

Curtis & Warren, for petitioner.

Anthony S. De Santis, for contestant.

COFFIN, S.—The petition of Mary A. Grande shows that Carlo Grande, her husband, died at his residence in the county of Columbia on May 9, 1912, leaving no will, and leaving him surviving the petitioner and two sisters, and a brother, as his only next of kin, and possessed of personal estate not exceeding

in value \$200, and a right of action against the Empire Brick & Supply Company for the death of decedent. She also alleges that Terressa Grande Martelli claims to be a daughter of decedent, which claim petitioner alleges is not true.

On the return of the citation, Terressa Grande Martelli appeared in person and answered orally, admitting all the allegations of the petitioner except the allegation that the petitioner was the widow of decedent and the allegation that said Terressa Grande Martelli, the contestant, was not a daughter of decedent, which she denied.

Considerable evidence was introduced by both parties and the same, so far as it is material, is briefly as follows: In or about the year 1889 the decedent, Carlo Grande, and one Rosa Saco were united in a so-called marriage by a religious ceremony performed by a Roman Catholic priest in a church at Carlopoli, Italy, and thereafter cohabited as man and wife at Carlopoli for a period of one year, during which time decedent introduced Rosa as his wife to various people and treated her as such. About one year after such so-called marriage, decedent came to America and located in the city of Utica. After he came to America, a child of such union was born in Italy, where his wife was, who is the contestant, Terressa Grande Martelli.

About six months after the birth of said child, the mother and the child came to America and went to Utica and lived with the decedent there from May until about December, during which time decedent and his so-called wife lived together as man and wife with the mother and father of his so-called wife; the decedent telling the mother and father of Rosa that Rosa was his wife, and making the same declaration to the uncle and two aunts of Rosa; declaring also to the mother and father of Rosa and her uncle and two aunts that the contestant was his daughter.

One of the witnesses testified that decedent called Rosa his wife and she called Carlo her husband in the presence of many

people; and that Carlo claimed contestant as his daughter and showed marked signs of affection for her.

In December, following her arrival in this country, Rosa, the so-called wife of decedent, eloped with one Vincenzo Mancino, taking contestant with her, and returning eventually to Italy, where she has since lived with said Vincenzo Mancino and has had at least one child by him.

The contestant continued to live with her mother in Italy for some years, during which time she corresponded with her father, the decedent, at least every three or four months, being addressed in his letters as "Dear daughter," and she addressing him as "My dear father." She commenced corresponding with him when she was nine or ten years old and kept it up until she came to America on June 5, 1908. She came at the request of her father and grandmother, who sent her the passage money, and when she landed in this country she went first to her grandmother in Utica. Upon her arrival there she wrote to her father, and he at once came to Utica and saw her, and she returned to his residence in Columbia county with him and lived with him for three or four months; then went back and spent three or four months with her grandmother and then returned to her father in Columbia county, and was afterward married in the city of Hudson.

When the decedent first saw the contestant after her arrival in 1908, he hugged her and cried, "My daughter," and showed marked signs of affection for her.

On the 11th of February, 1904, Carlo Grande, the decedent, was united in marriage to the petitioner, Mary Arcuri, at the city hall in Carlopoli, in the province of Catanzaro, Italy, by the acting mayor of said town, and in accordance with the laws of the kingdom of Italy. In April following she and decedent came back to America, where they resided and lived together as man and wife until his death.

By the laws of the kingdom of Italy, in force at the time the ceremony was performed between decedent and Rosa Saco, only civil marriages had any validity.

It is therefore clear that, by the laws of Italy, the so-called marriage between decedent and Rosa Saco had no validity, and the child of that union was illegitimate. If, however, decedent and contestant's mother afterward so lived and conducted themselves in this country as to create the presumption of what is called a "common law marriage," then contestant has been legitimized.

The case of *Hynes v. McDermott*, 91 N. Y. 452, in my opinion is decisive on this question. There the facts were in principle similar. One Hynes and a Mrs. Saunders commenced illicit intercourse in London, Eng., which was not sanctioned by a marriage valid by the English law. The following month they were in Paris, where an acquaintance saw them together at a hotel dinner table, and was introduced by Mr. Hynes to his wife as Mrs. Hynes, and he afterward frequently saw them at their temporary residence in Paris. Later they returned to England, where they lived together until Hynes' death. During that time he was in the habit of addressing her as Mrs. Hynes, and their life together was the ordinary household and family life of persons lawfully wedded, having children, the fruit of lawful wedlock, and he treated her with apparent respect and affection, and was fond of his children, and spoke of her in the presence of others as his wife.

The court said that, if the issue of marriage depended upon the evidence that there was a marriage according to the forms of English law, the plaintiffs could not recover, and that the presumption of such a marriage, raised in the first instance by proof of habit and repute, was rebutted by evidence on the part of defendants; but that no proof having been given of the marriage law in France, and in the absence of proof to the con-

trary, it would be assumed that the requisites to constitute marriage are the same in another country as in our own, and that it might be safely assumed as the fact that in France the mutual consent of the parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage; that the jury were authorized to find that in France the requisite consents were interchanged and that the parties then and there became husband and wife.

As was so forcibly said by the Court of Appeals in that opinion: "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence. * * * In *Piers v. Piers* (2 H. L. Cas. 331) Lord Campbell said, that the presumption could be negated only 'by disproving every reasonable possibility.'"

The case at bar in some respects is even stronger than the one just cited, because, while in the latter the union was meretricious in its inception, here a clear intent can be spelled out to enter into a relation sanctioned by a public, religious ceremony. I should prefer to call the marriage in Italy an illegal one rather than an illicit one, because the word "illicit" is more synonymous with "meretricious" than with "illegal." It must also be borne in mind that the presumption of the law is that the contestant is a legitimate daughter and that those who assume the fact of illegitimacy have cast upon them the *onus* of establishing it. *Caujolle v. Ferrié*, 23 N. Y. 90.

I am constrained to hold that it must be presumed that Carlo Grande and Rosa Grande interchanged matrimonial consents

after arriving in this country; that they then and there became husband and wife, and that the contestant, Terressa Grande Martelli, was thus legitimized.

The question next presents itself, what effect, if any, had the elopement and subsequent meretricious relation between Rosa Grande and Vincenzo Mancino upon the petitioner's rights? Must we presume that Carlo Grande committed the crime of bigamy when he married the petitioner?

In the case of *Clayton v. Wardell*, 4 N. Y. 230, the court held that the presumption that a meretricious union continued to exist as such was at least equal to the presumption in favor of the subsequent marriage, and that the most that can be said upon this point is that there is a conflict of presumptions and in such a case the rule is that that must yield which has the least degree of probability to sustain it. If we held that the void union in Italy was presumed to continue void in order to sustain the subsequent marriage with the petitioner, it would be because the court would hesitate to presume that decedent committed a crime when he married petitioner. Is there no way by which the contestant's legitimacy can be sustained without being followed by the presumption that decedent committed the crime of bigamy when he married petitioner?

I have found no cases in this state in which the court has presumed the first marriage to have been legally dissolved in order to support the legality of the second marriage, but in the case of *Matter of Meehan*, 150 App. Div. 681, the Appellate Division in the first department refers to a number of decisions in other jurisdictions to that effect (*Hunter v. Hunter*, 111 Cal. 261; *Erwin v. English*, 61 Conn. 502; *Pittinger v. Pittinger*, 28 Col. 308; *Potter v. Clapp*, 203 Ill. 592; *Boulden v. McIntire*, 119 Ind. 574; *Leach v. Hall*, 95 Iowa, 611; *Howton v. Gilpin*, 69 S. W. Rep. (Ky.) 766; *Killackey v. Killackey*, 156

Mich. 127; Maier v. Brock, 222 Mo. 74; Thewlis' Estate, 217 Penn. St. 907; Carroll v. Carroll, 20 Tex. 732; Thomas v. Thomas, 53 Wash. 297; 101 Pac. Rep. 865), and I might add the following quotation from 26 Cyc. 880: "In the case of conflicting marriages of the same spouse, this presumption [in favor of its validity] operates in favor of the second marriage. Accordingly the burden of showing the validity of the first marriage is on the party asserting it, and even where this is established it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage. It has been held, however, that the presumption of divorce or death of a prior spouse will not be indulged in favor of the alleged second marriage the proof of which rests merely on cohabitation and repute."

The Appellate Division, in the Meehan case, *supra*, well says: "The law indulges in presumptions from the necessities of the case in the absence of sufficient evidence to establish the fact to be proved. While the known facts may be insufficient of themselves to justify a particular inference, they may tend to weaken or strengthen a particular presumption. * * * In this case the presumption of the validity of the second marriage is greatly strengthened by the uninterrupted cohabitation of the parties to it for more than twenty years and until the death of one of them."

If the court, in order to legitimize a child, will presume, as in the case of Hynes v. McDermott, *supra*, that the parties thereto entered into an agreement *in præsenti* while in France to take each other as man and wife; if the court will presume that a union ordinarily illicit continues as such, even in the face of a public living together as reputed husband and wife, in order

that the second marriage be not bigamous, is it too much for us to presume that Carlo Grande obtained a legal divorce from his first wife after she eloped with Vincenzo Mancino and thereafter lived with him and bore children by him?

It was within the power, we assume, of the contestant to have proved by the evidence of the first wife that no divorce had ever been obtained and that the marriage was still in force. This she failed to do, and I therefore am of the opinion that the first marriage must be presumed to have been legally dissolved prior to the marriage of decedent with petitioner.

Findings and the decree will be prepared in accordance with the above views, and limited letters of administration will be issued to Mary Arcuri Grande.

Decreed accordingly.

Matter of the Appraisal of the Estate of MARY S. ROBINSON,
Deceased, Under the Acts in Relation to the Taxable Trans-
fers of Property.

(Surrogate's Court, Westchester County, April, 1913.)

TAXES—TRANSFER TAX—TAX LAW, § 221—PROVISION OF TAX LAW AS TO
TRUSTEES—CORPORATIONS.

A bequest to individuals in trust for charitable purposes is subject to a tax under section 221 of the Tax Law, notwithstanding the will provides that the trustees, if they deem it advisable, may cause a corporation to be created for the purpose of executing a trust, no corporation having been formed at the time of the application to assess the tax.

APPEAL from an order fixing and assessing the transfer tax.

John J. Sinnott, for state comptroller.

Henry Necarsulmer, for executor and trustees.

SAWYER, S.—This is an appeal by the executor of and the trustees under the last will and testament of Mary S. Robinson, deceased, from an order of the surrogate of Westchester county, fixing and assessing the transfer tax upon the transfer of the testatrix's residuary estate.

The testatrix died in October, 1909, leaving a last will and testament, and by the 9th and 10th paragraphs of said will she devised and bequeathed her entire residuary estate.

"*Ninth.* I direct my said executor to pay over the rest, residue and remainder of my estate to the said Burton C. Meighan and Frank B. Upham, in trust, however, for the following uses and purposes:

"The said trustees are to invest such portion of the fund as shall not be used for the purposes herein specified, in the securities prescribed by law as savings bank investments; and they are to disburse the principal or interest, or both, of said fund in their discretion as follows, to wit:

"To provide shelter, necessities of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same. Preference is to be given to persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian or Episcopal; and who are not addicted to the use of intoxicants or tobacco, nor to attendance at theatrical entertainments.

"*Tenth.* I authorize and empower my said trustees in their discretion, to appoint other persons, not exceeding five, to act

with them in the execution of the trusts or either of them herein provided for; and I direct that the execution of said trusts shall thereupon devolve upon all of the said trustees jointly and upon the survivors of them. If the said two trustees, Burton C. Meighan and Frank B. Upham, deem it advisable they may cause a corporation to be created for the purpose of executing the trusts provided for in this will."

The attorney for the appellant claims that the above bequest to Burton C. Meighan and Frank B. Upham, as trustees, is exempt from a transfer tax under section 221 of chapter 62 of the Laws of 1909, being chapter 60 of the Consolidated Laws, as it is left in trust for charitable purposes and provision is made that the execution of such charitable purposes *may be carried out by a corporation*, if the trustees think it advisable.

The contention of the comptroller is set forth in his brief, at page 2, which is as follows: "There is no doubt that the purposes provided for by the testatrix were charitable and benevolent. Nor can there be any doubt that the transfer of her residuary estate was to these two trustees and not to a corporation."

The question, therefore, is clearly presented. It is: "Is a bequest to an individual, in trust, for charitable purposes exempt under section 221 of the Transfer Tax Law?"

It is the contention of the state comptroller that the bequest or transfer in question is not exempt under section 221 of the Transfer Tax Law. Tax Law, art. X.

That portion of section 221 of the Transfer Tax Law which is relevant to the question here presented is as follows: "But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized exclusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this

article. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes."

Section 220 of the same law reads as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, *in trust or otherwise*, to persons or corporations not exempt by law from taxation on real or personal property."

It is admitted that the amount of the transfer in this matter exceeds \$500.

The appellant cites as an authority in support of his contention Matter of Graves, 171 N. Y. 40.

The Graves case was decided under subdivision 7 of section 4 and section 220 of the Tax Law, as it existed in 1896, which said date was the date of the death of the testator in said case.

By chapter 382 of the Laws of 1900 section 243 of the Transfer Tax Law was passed and reads as follows:

"§ 243. Exemptions in article one not applicable.—The exemptions enumerated in section four of the tax law, of which this article is a part, shall not be construed as being applicable in any manner to the provisions of article ten hereof."

This section was re-enacted and became known as section 244 of the Tax Law by chapter 62 of the Laws of 1909, being chapter 60 of the Consolidated Laws.

"Manifestly it was intended by this new section to make the exemptions in section 4 of the General Tax Law no longer ap-

plicable to the exemptions under the Taxable Transfer Law, and no longer the rule by which such exemptions should exist or be determined." Matter of Huntington, 168 N. Y. 399.

It is evident, therefore, that the only exemptions now to be considered in the case at bar are those enumerated in section 221 of the Tax Law.

The Graves case is, therefore, no longer an authority, unless by comparison it can be shown that the statute under which the decision was based is similar to the statute under which this exemption is claimed. In other words, are the exemptions enumerated in subdivision 7 of section 4, under which the Graves case was decided, similar to or in substance the same as the exemptions enumerated in section 221 of the Tax Law.

Subdivision 7 of section 4, chapter 908 of the Laws of 1896, reads in part as follows:

"7. The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation."

In the section just quoted the real property of a corporation or an association organized for specific *purposes* mentioned was exempt not only from the transfer tax but from all taxes of every kind and description, and the personal property of such a corporation was also exempted.

By a careful examination of section 221 of the Tax Law it will be observed that no real or personal property is exempted unless *devised or bequeathed to the corporation* therein set

forth. No mention is made of the word "association" in the first paragraph of this section, neither is the word "purposes" included. The statute says flat-footed that the corporations mentioned are only exempt from taxation when the property is devised or bequeathed to the corporation.

In the last part of section 221, as quoted, there are specific exemptions where a bequest is made to a corporation or an association organized exclusively for certain *purposes*. Clearly, however, the appellant is not entitled to an exemption under the latter part of this section, as the bequests made were those which consisted of savings bank securities or money, and these clearly do not come within the exempt class, as the section specifically says that personal property shall be exempted "other than money or securities."

However, I do not think that the exemption is claimed under the latter part of section 221, just quoted.

The Graves case was decided on the ground that the Laws of 1893 re-established the statute of uses, and that subdivision 7 which was construed in that case included corporations organized for specific purposes. As shown above, the word "purposes" is excluded in the first part of section 221, as is also the word "association," and the devise or bequest in this case was made directly to the two trustees.

The question in this case then is simply this: "Is a bequest to two trustees, in trust, for charitable purposes, with a discretionary right given to the two trustees to form a corporation, if they deem it advisable, to carry out the trusts provided for in the will of the testatrix, exempt from taxation under the provisions of the first portion of section 221 of the Transfer Tax Law," which is as follows: "But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized ex-

clusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this article."

There is no mandatory direction by the testatrix to the trustees to form any corporation. They may do so if they choose or they may increase the number of trustees, but the right given to form a corporation is simply permissive and not mandatory.

The testatrix died in 1909, four years ago. No corporation has ever been formed by the trustees nor have I received any intimation that one will ever be formed. I think that I can safely say that one never will be formed. If the intention of the trustees had been to form a corporation to carry out the purposes as set forth in the will, they certainly would have filed their certificate of incorporation within the four years last past. I am compelled to take the situation as I find it. The title to the "res" or trust fund is certainly now vested in Burton C. Meighan and Frank B. Upham, in trust, for the purposes as set forth in the will of the testatrix. Section 220 specifically states that the transfer of any property, real or personal, over \$500 is taxable, whether the same is in trust or otherwise.

By the most strained construction of section 221 I do not see how the framers of the law ever intended that a bequest such as the one under consideration should be exempt under the clause quoted. The devise is clearly not to a corporation. There being no corporation formed, how are we to ascertain the status of the corporation and determine whether or not it is a charitable, religious or other kind of a corporation. This phase of the situation was considered in the Matter of White, reported in 118 Appellate Division, 869, and the judge writing the opinion stated as follows: "The status of this corporation must be determined by the statutory law and its certificate of incorporation rather than by what it has assumed to do thereunder."

This is the proper way of determining the status of any corporation claiming exemption under the Transfer Tax Law.

The above case was cited with approval in *Matter of Moses*, 138 App. Div. 525.

It is an elementary rule of statutory construction that the words of a statute are to be given the usual ordinary meaning. *McCluskey v. Cromwell*, 11 N. Y. 593; *Matter of O'Neil*, 91 id. 516; *Matter of Daly*, 79 Misc. Rep. 586.

If the legislature had intended to pass an act allowing exemptions to trustees for charitable purposes, they certainly would not have divided the section into two different paragraphs, one in which they exempted only devises and bequests to certain corporations and the other of which they exempted where the devise or bequest was to corporations for charitable purposes.

As the case at bar is a devise to trustees for a charitable purpose, by the most liberal construction, I am compelled to hold that even though there is a permissive right to form a corporation, where some steps have not actually been taken to form such a corporation, this fact in itself will not be sufficient to warrant an exemption under the first paragraph of section 221 of the Tax Law. If the corporation had been already formed when the application was made to this court, the result might be different. I am not called, however, to pass upon this question at this time. The corporation has never been formed.

Clearly the framers of this statute never intended any devise to a trustee for charitable purposes to be exempt under section 221. While fully appreciating the charitable intentions of the testatrix, I am of the opinion that the statute shows clearly that a tax must be imposed in this case upon the residuary estate transferred. If the law is severe then the remedy lies with the legislature and not with the courts.

Order affirmed.

Matter of the Estate of PAMELA HYATT, Deceased.

(Surrogate's Court, Westchester County, April, 1913.)

SURROGATE'S COURTS—JURISDICTION—TO HEAR AND DETERMINE A CLAIM FOR WORK DONE.

A surrogate has no jurisdiction to hear and determine a claim for work done, on the order of an executor, after the death of the testatrix.

PETITION for payment of a claim created by an executor subsequently to testatrix's death.

Stuart Baker, for claimant.

George F. Allison, for opposition.

SAWYER, S.—In this proceeding a petition was presented to the Surrogate's Court praying for a decree directing the executors to pay the claim of the petitioner. One of the executors, Mortimer Hyatt, and the petitioner, Ralph O. Hiler, both testified that the work which was performed, as mentioned in the petition presented herewith, was ordered by said executor Mortimer Hyatt. In other words, the claim in question was under a contract which had evidently been entered into by one of the executors subsequently to the death of the testatrix, Pamela Hyatt.

Under the provisions of section 2722 of the Code of Civ. Procedure, a petition may be presented: "By a creditor, for the payment of a debt, or of its just proportionate part, at any time after six months have expired since letters were granted."

The word "creditor," as used in the section of the Code

above referred to, refers to a creditor of the estate of the decedent. The surrogate has no jurisdiction to order the payment of a claim created by an executor. His jurisdiction is only as to claims against the deceased. *Bulkley v. Staats*, 4 Red. 524; *Hall v. Dusenbury*, 38 Hun, 125; *Matter of Walker*, 70 App. Div. 263.

In the case of *Bulkley v. Staats*, the court held as follows: "The Surrogate has no power to direct the payment of a claim created by the executor. The jurisdiction is * * * only to claims against the deceased."

In the case of *Hall v. Dusenbury*, the decision was as follows: "The term 'creditor' is confined to those persons to whom the deceased was indebted during his lifetime."

The claim of a creditor of a decedent's estate, which, under section 2722 of the Code of Civil Procedure, the executor may be directed by the surrogate to pay, is a liquidated claim undisputed; and the liquidation can be only on an accounting not of the acts of the executor, but of deceased, which can be made by the surrogate only on consent of the parties as provided by section 1822 of the Code of Civil Procedure.

Clearly the petition presented in this case asks for the payment of a claim which had been ordered and created by the executor subsequently to the death of the testatrix. The Surrogate's Court has no jurisdiction to determine claims of this character.

Petition dismissed.

Matter of the Probate of the Last Will and Testament of
ERICH A. BLECKWEHL, Deceased.

(Surrogate's Court, Kings County, April, 1913.)

TRUSTS—WHAT ESTATE CREATED FOR A PERIOD MEASURED BY TWO LIVES
—REAL PROPERTY LAW, § 66—ESTATE BY MARRIAGE—VESTING OF
LANDS IN RESIDUARY DEVISEES WITH POWER OF SALE—WILLS.

Where a testator devised and bequeathed a certain house with all its contents, except as specifically bequeathed, in trust, during the lives of two daughters and for their use and the use of another daughter and a son while the four remained unmarried, free of any charge for occupancy except carrying charges, with direction that, in the event of any two of them consenting before or at the termination of the trust, the property be sold and the proceeds divided equally among testator's twelve surviving children, who were named as residuary devisees, the issue of any deceased child to take their parent's share *per stirpes*, the trust is passive, and a legal estate is created for a period measured by the lives of the two daughters.

Under section 66 of the Real Property Law, each of the four devisees as tenants in common took one-fourth of the subject of the devise, which, except for the extinction of his estate by marriage or by the consent of the beneficiaries, endured during the lives of said two daughters, and upon his decease within the longer of such two lives would pass to his heirs at law.

The provision as to marriage means that each individual share is to be curtailed only by his own marriage, and, upon that event in the life of any one of the devisees, his share will pass to the residuary devisees and not to the surviving tenants for the two lives.

Upon the complete termination of the initial tenancy, however effected, the attempted trust as to the remainder must fail as to the estate during the two lives, and the lands would thereupon vest in the residuary devisees with power of sale in the so-called trust deeds for the purposes of conversion and division.

PROCEEDING upon the probate of a will.

Watson & Kristeller, for proponent.

Herzfeld & Sweedler (Hermon H. Shook, of counsel), for Annie Breitenbecker.

KETCHAM, S.—The will propounded is in part as follows:

"Fifth. I give, devise and bequeath to Edward Bleckwehl and Walter Bleckwehl, in trust nevertheless, the house known as 393 East Third Street, in the Borough of Brooklyn, together with all the furniture and contents thereof, except as hereinbefore specifically bequeathed, to hold the same during the lives of my daughters, Mildred and Florence, and for the use and occupation of my daughters, Rebecca, Florence and Mildred, and my son, Walter Bleckwehl, while they remained unmarried; free, however, of any charge for said occupancy, except carrying charges, but in the event that any two of the aforementioned beneficiaries shall consent thereto before the termination of said trust, or at the termination of said trust, I direct that the property be sold and the proceeds of such sale shall be divided equally among my children, Emma Matilda Desch, Rebecca Bleckwehl, Henry Bleckwehl, Edward Bleckwehl, George Bleckwehl, Albert Bleckwehl, William Bleckwehl, Lulu Haviland, Florence Bleckwehl, Walter Bleckwehl, Mildred Bleckwehl and Annie Breitenbecker; the issue of any deceased child to take their parent's share per stirpes."

This is followed by a residuary gift to the twelve persons named in the preceding paragraph.

In the trust for the two lives, which is attempted in the 5th paragraph, there is no expression or implication from which there can be derived any power or duty in the trustees to receive the rents, issues and profits.

The right to receive the income cannot be implied from the nature of the duties of the trustees. Even where there is an

actual devise to the trustees no estate can vest in them unless they are also (that is, in addition to the devise to them of the lands) empowered to receive the rents and profits. Real Prop. Law, § 97.

Again, the statute declares that although a disposition by devise be made to any person for the use of another, no estate vests in the trustee. Real Prop. Law, § 83.

No active duty of the trustees can be spelled out from the provision that they shall "hold" the land. Hence, none of the express trusts recognized by statute (Real Prop. Law, § 96) results and the trust, such as it is, becomes dry and passive.

But the critic of this will argues that because the trust is dry and passive there is no virtue left in the provision by which it was created and that the lands must descend to the heirs of the decedent. This contention assumes that a passive trust is the same thing as an utterly void trust.

Far different from an invalid trust is a trust for the use of another. Unless there was a distinction, the law would not have labored to preserve the two terms. The passive trust, though by our statute excluded from the family of express trusts, remains one of the oldest and most respectable institutions of legal history. When found in a will it is not an unreality like an invalid trust. It is preserved and effectuated in every detail so far as to carry out all of its purposes.

The law does not reject its intention. Rather does it insist upon giving effect thereto, but only in the form of a legal estate in the proposed beneficiary instead of the equitable estate which the defeated trust had contemplated.

It is impossible that a trust in one for the use of another can be regarded as "completely extinguished." It must doubtless be shut out from among the statutory express trusts but its intention must survive, and the law must be zealous and astute

to reproduce in the form of a legal estate every element which in the case of a beneficial estate would have been enjoyed if the trust had been wholly successful.

The problem of this will is to rescue from its unfortunate language every wish of the testator which is not contrary to law. Its obvious intention was that four persons should have the use and occupation of the lands during the lives of two of their number, subject to certain incidents to be separately considered.

The attempt of the will-maker to accomplish this by a trust has failed, but there is no warrant for the contention that his effort itself has failed though his method is condemned. If, instead of the equitable estate which he meant to create, there be substituted a legal estate of the same extent and nature so far as possible, then the will is to be paraphrased as follows: "I devise the house to my four children named during the lives of two of their number named, with remainder to others at the end of the two lives designated."

It is contended that the *habendum* "to hold the same during the lives," etc., pertains only to the trustees and must vanish from consideration as soon as the trust is found deficient. But the *habendum* was to hold for the period indicated and for the use and occupation of the beneficiaries. The period was designed only as a measure of the time during which the beneficiaries might use and occupy. It was wholly personal to those who might have the use of the estate.

If, then, there was created a legal estate for a period measured by two lives, it remains to ascertain the several interests of those to whom such estate was given.

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy." Real Prop. Law, § 66.

Each of the four devisees then took one-fourth of the subject of the devise which, except for the extinction of his estate by the vicissitudes of marriage or by the consent of the beneficiaries, endured during the two lives designated and upon his decease within the longer of such two lives would pass to his heirs-at-law.

If, then, each of the beneficiaries holds his own share in common, the provision as to marriage must mean that each individual's share is to be curtailed only by his own marriage, and that, upon that event in the life of any one of these devisees, his share will pass not to the surviving tenants for the two lives, but to the residuary devisees.

It is obvious that the tenancy for the two lives may be shortened by the consent provided for in the will; that upon the complete termination of the initial tenancy, however effected, the attempted trust as to the remainder must fail on the grounds indicated *supra* as to the estate during the two lives, and that the lands will thereupon vest in the twelve persons named in the 5th paragraph, with power of sale in the so-called trustees for the purposes of conversion and division.

The construction thus indicated may be embodied in the decree.

Decreed accordingly.

**In the Matter of the Judicial Settlement of the Account of
JEAN WEIL, as Executor of the Last Will and Testament of
CHARLES WILDERMANN, Deceased.**

(Surrogate's Court, Kings County, April, 1913.)

TRUSTEES—ACCOUNTING BY—ALLOWANCE OF COMMISSIONS—PAYMENTS.

An accounting trustee may not be allowed commissions on income paid out if there is no income on hand.

Where there is nothing in the account to support the suggestion, an amount put into an investment along with principal may not be considered as unapplied income.

That the trustee has not paid over a dividend stock to the beneficiary entitled to all income is a sufficient basis for regarding said stock as principal.

PROCEEDING upon the judicial settlement of the account of an executor.

Wahle & Kringel, for accountant.

Rabe & Keller, for Elise Wildermann.

Eugene V. Brewster, special guardian for infants, Paul Wildermann and Carl Wildermann.

KETCHAM, S.—The accounting trustee cannot have commissions on income paid out by him if there is no income in hand.

While it is suggested in his brief that he has \$2,552.32 of unapplied income, there is nothing in the account to support the suggestion and the fact that the same sum has been put into an investment along with principal has the contrary effect.

It is insisted that 250 shares of stock received by the trustee

as a "stock dividend" is income, but beyond the description of this stock under the words "stock dividend" there is nothing to indicate that it was not an accretion to the principal. *McLouth v. Hunt*, 154 N. Y. 179; *Lowry v. Farmers' Loan & Trust Co.*, 172 id. 137; *Robertson v. DeBrulatour*, 188 id. 301; *Thayer v. Burr*, 201 id. 155; *Matter of Harteau*, 204 id. 292; *Matter of Hoagland*, N. Y. L. J. Feb. 13, 1912.

The character of the stock as principal or income being a question of fact, it is significant that the trustee has for years carried the stock in question with the general principal of the trust and has evidently collected the dividends upon it and paid them to the beneficiary. That he has not paid over the dividend stock to the beneficiary entitled to all the income is a sufficient basis for regarding it as principal.

The decree is made without allowance of commissions.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of MAX MANDELBAUM and GUSTAVE FRIEDEBERGER as Executors of the Last Will and Testament of EMILIE ROSENDAHL, Deceased.*

(Surrogate's Court, New York County, April, 1913.)

EVIDENCE—PROMISSORY NOTE—NOTICE OF PROTEST WHEN INSUFFICIENT IN LAW—CORPORATIONS—NEGOTIABLE INSTRUMENTS—ADMISSIBILITY OF.

WAIVER—OF NOTICE OF PROTEST—NEGOTIABLE INSTRUMENTS.

Where, on the hearing before a surrogate of a disputed claim on a promissory note indorsed by decedent, it appears that the

* Affirmed, 159 App. Div. 909.

notice of protest was mailed to her at the place of business of a corporation in which she was a director and stockholder, but no proof was offered that she actually received said notice, or that she was accustomed to receive her mail at that place, or that it was her place of business, the claim must be disallowed on the ground that the notice proved was insufficient in law to charge her as indorser.

A certified copy of the corporation minutes under the secretary's hand and under the corporate seal, reciting that decedent attended a directors' meeting on a certain day, offered in evidence to impeach the secretary who had testified that decedent was neither a stockholder nor a director and that no directors' meeting was held, is not evidence of the facts therein recited.

The original minutes of a corporation are admissible to prove a meeting of its directors.

An executor may not waive notice of protest of a promissory note on which his testatrix is an indorser.

HEARING on the judicial settlement of executors' accounts, of a disputed claim on two promissory notes indorsed by testator.

A. Welles Stump, for claimant.

A. L. Mandelbaum, for executors.

Samuel Markewich, special guardian.

FOWLER, S.—The executors of Mrs. Emilie Rosendahl have disputed the liability of the estate of testatrix upon a claim for \$2,391.16, filed by the European-American Bank. The claim arises by reason of the indorsement of two notes by the testatrix, and her executors reject the same solely upon the plea that proper notice of dishonor was not given to their testatrix. By consent the issue is now before the surrogate for determination upon the final judicial settlement of the executors' account.

The earlier note bears date June 14, 1910, and matured in four months, and the other note is dated July 28, 1910, and matured August 28, 1910. The maker of both instruments is A. Rodena & Co., a domestic corporation, whose place of business up to the middle of August, 1910, when a receiver in bankruptcy was appointed, was at No. 83 Reade street, New York city. The corporation there occupied the two upper floors of a five-storey building. In December, 1909, the late Mrs. Emilie Rosendahl, as well as her husband, was one of the incorporators of A. Rodena & Co., and she subscribed for one share of the par value of \$100 out of a total authorized issue of \$40,000.

The evidence discloses that the residence of Mrs. Rosendahl was No. 315 West Fifth-eighth street, New York city, and that she was not engaged in business, unless as already stated. The secretary of the corporation testified that Mrs. Rosendahl was neither a stockholder nor a director, and that no directors' meeting was held. Counsel for the claimant, however, on cross-examination offered in evidence for the purpose of impeachment a certificate of the corporation's minutes under the secretary's hand and under the corporate seal, which certificate was delivered to the claimant bank when the corporation opened a bank account with it. In such certificate it is recited that Mrs. Rosendahl attended a directors' meeting on January 17, 1910. It does not appear therefrom where the meeting was held, and no attempt was made to offer the original minute book of the corporation. The evidence relied upon to establish that the defendant attended the directors' meeting at No. 83 Reade street is not competent. The original minutes of the corporation could have been used to prove the corporate meeting (*Rudd v. Robinson*, 126 N. Y. 113; *Leonard v. Faber*, 52 App. Div. 499; *Woodhaven Bank v. Brooklyn Hills Improvement Co.*, 69 id. 489; *Abb. Tr. Ev.* [2d ed.] 58), but not the secretary's certified copy. *Abb. Tr. Ev.*, *supra*, 63.

Counsel for the claimant stated that the certificate was offered for the purpose of impeachment, and consequently a further question arises whether a paper signed by a witness and offered in evidence upon his cross-examination to show his inconsistent statement is evidence of the facts therein recited. It has been authoritatively settled that it is not. To attach probative value to such an *ex parte* statement, unsubstantiated by the witnesses' oath, would sanction hearsay evidence. *Sloan v. New York Central R. Co.*, 45 N. Y. 127; *Plyer v. German-American Ins. Co.*, 121 id. 689; *Wigmore Ev.*, §§ 1018, 1043; *McKiernan v. Hall*, 65 Misc. Rep. 138.

The notices of protest under the seal of the notary giving it, offered in evidence by the claimant, recited that the notices were duly mailed to the decedent at "83 Reade street, New York City, the above named place being the reputed place of residence of the person to whom said notice was so addressed and the post office nearest thereto." The notary offered as his reason for addressing the notice there that he believed the indorser was interested in A. Rodena & Co. At least a week before the notes were protested the corporation went into the hands of a receiver, and the latter assumed possession of the corporation's property at No. 83 Reade street. The bankruptcy of the maker of the notes did not dispense with the necessity of notice to the indorser. *Moore v. Alexander*, 63 App. Div. 100; *O'Bannon Co. v. Curran*, 129 id. 90. No proof was offered to show that the notices actually reached the indorser.

Attempts were made during the lifetime of Mrs. Rosendahl and after she had become too ill to be able to transact any business to compound her liability. But sufficient evidence was not introduced to establish a waiver on her part of the requirement of notice of dishonor. *Ross v. Hurd*, 71 N. Y. 14. After the death of testatrix further negotiations were under-

taken between the claimant and her executors; but no acts or conduct of the latter could create a liability against the property of the estate, as executors cannot charge the assets of an estate with any liability not already existing. *Metropolitan Trust Co. v. Truax*, 154 App. Div. 442.

The claimant's right to recover must stand upon the validity of the notices served. The Negotiable Instruments Law (Consol. Laws, chap. 38, § 179) provides: "Section 179. Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: 1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or 2. If he live in one place, and have his place of business in another, notice may be sent to either place; or 3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning. But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section."

It may be of interest to note in passing that the present law is but a re-enactment of chapter 612, Laws of 1897, as amended by chapter 336, Laws of 1898. Prior to 1897 the Law of Negotiable Instruments was almost altogether the common law, and in interpreting and applying the present codified law it may be well to consider the state of the law as then determined by the decisions and the few statutes then in force. The general rule was that notices of dishonor might be served either at the indorser's residence or place of business. *Story Prom. Notes* (7th ed.), 413; *Bayley, Bills & Notes* (2d Am. ed.), 271; *Chitty Bills* (12th Am. ed.), 531; *Williams v. Bank of United States*, 2 Pet. 96; *Ransom v. Mack*, 2 Hill, 587; *Van Vechten v. Pruyn*, 13 N. Y. 549; 3 Kent Com. 107. Originally notice

by mail was not sufficient when the party giving the notice and the party entitled to receive the notice resided in the same town or city. But this rule was relaxed so as to allow the use of the mails wherever a regular post was established. *Shaylor v. Mix*, 4 Allen, (Mass.) 351; *Ransom v. Mack*, *supra*. Chapter 141, Laws of 1835, allowed notices to be sent to the place where the addressee resided when he signed, unless he added at the time of the signature the particular post-office to which he desired the notices to be addressed. As late as 1856 notices could not be given by mail when the residence of the indorser was in the same village where the instrument was payable. However, since chapter 416, Laws of 1857, was passed, when the residence or place of business, or the place specified at the time of the signature of the person entitled to receive notices, is in the same city or town where the instrument becomes payable, notice by mail is sufficient.

Thus it is that when sections 174 and 179 of the Negotiable Instruments Laws were enacted, notice to either the place of residence or place of business was sufficient, and notice by mail was as good as personal service. The language of section 179, now in force, changes the prior law. Notification may now be given at the place of business when the latter place and the place of residence are in different places. Unless the term "place" in section 179 is used in a different sense from that given to it in section 174 of the same statute, then under subdivision 2 of section 179 the place of business is not the proper address at which to give notice, unless the indorser does not live in the same city, town or village. Cf. *American Ex. Nat. Bank v. American Hotel V. Co.*, 103 App. Div. 374. Of course in most cases a notice sent to the place of business is good under subdivision 1, considering it as the customary place for the receipt of the addressee's letters.

No claim is made in this case that the residence of the testa-

trix was not in New York city, where it is claimed she had her place of business. Nor does the claimant attempt to bring itself within the latter portion of subdivision 1 of section 179 by showing that the testatrix was accustomed to receive her mail at No. 83 Reade street. But assuming that notice in all cases is sufficient when served at or mailed to the place of business, claimant did not establish that No. 83 Reade street was the indorser's place of business. *Berridge v. Fitzgerald*, 10 Best & Smith, 668, is relied upon by claimant. In that case the defendant and a limited stock company in which he was one of the directors, in order to ward off a collection suit against the company, agreed to give a bill of exchange upon the company indorsed by the defendant. The transaction was consummated at the company's office. The defendant was an acting director and was in the habit of attending at the company's office. The court decided that the defendant had held out the company's office as his place of business for the purpose of receiving notice of dishonor there. The facts in the matter now before me distinguish it from the case cited, in that Mrs. Rosendahl does not appear to have been an acting director or in the habit of attending at the company's office. Further, the copy of the minutes offered in evidence does not state that the meeting which Mrs. Rosendahl attended was held at No. 83 Reade street, to which place the notice was addressed. In *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514 (not cited by counsel), it was held that a notice was sufficient when directed to the defendant at his desk in the Custom House. The defendant was a deputy collector and had his office in the Custom House. The court decided that the notice was sufficient, being of the opinion that the defendant had his place of business at the Custom House. The court presumed that the defendant was in the habit of attending there daily in the discharge of his duties.

The testatrix cannot be said to have had a place of business

at No. 83 Reade street. She may never have been there more than once, and then only to take a formal part in an organization of a corporation. The note does not appear to have been endorsed in the company's office, as was the fact in *Berridge v. Fitzgerald*, nor was Mrs. Rosendahl in the habit of attending at the company's office. Nor can she be taken impliedly to have held out that place as the proper place to send notices. The notes did not have any address thereon save the address of the claimant, where they were made payable. The claimant does not appear to have been sufficiently diligent. *University Press v. Williams*, 48 App. Div. 188.

It follows from what has been stated that the notice proved was not sufficient in law to charge the indorser. The claim must, therefore, be disallowed.

Decreed accordingly.

Matter of the Application for Letters of Administration on Goods, Chattels and Credits of SIDNEY F. PATTEN, Deceased.

(Surrogate's Court, New York County, April, 1913.)

EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION WHEN GRANTED—STATUTE OF DISTRIBUTIONS.

Under section 2660 of the Code of Civil Procedure administration by relatives is to be granted only to such as are actually entitled to share in the distribution of the estate in the order in which such relatives are named.

Where a grandchild is the only person entitled to take under the Statute of Distributions all the estate of an intestate, letters of administration must be issued to him in preference to the intestate's half-brother.

PETITION for letters of administration.

William H. Blain, for John Thomas Brattin, petitioner.

Abraham Rudensey, for Louis DuBois, petitioner.

COHALAN, S.—Sidney F. Patten died intestate March 5, 1912, leaving as only next of kin five half-brothers, one half-sister and a grandchild of full age. The grandchild has presented a petition asking for the issuance to him of letters of administration. With the petition are renunciations from the half-sister and from three of the half-brothers. The other two half-brothers were cited on this application, and one of them does not appear. The other half-brother cited appears and petitions for the granting to him of letters of administration. The question then squarely presented here is: As between the grandchild and the half-brother of the intestate, who is entitled to administer the estate? Under the Statute of Distribution of personal property the grandchild takes all the estate and the half-brother takes nothing. The construction of section 2660 of the Code of Civil Procedure is involved in the decision of this matter. That section provides that:

“Administration in case of intestacy must be granted to the relatives of the deceased *entitled to succeed* to his personal property, who will accept the same, in the following order:

- “1. To the surviving husband or wife.
- “2. To the children.
- “3. To the father.
- “4. To the mother.
- “5. To the brothers.
- “6. To the sisters.
- “7. To the grandchildren.
- “8. To any other next of kin *entitled to share in the distribution of the estate.*”

Does the above statute mean that administration as-between

relatives is to be granted *only* to relatives of the deceased *who actually share* in the distribution of his personal property, or does it mean that administration is to be granted to those relatives mentioned in the enumeration, in the order named, *whether the relatives so named share or not?*

The placing of the grandchildren seventh in the enumeration in section 2660, Code of Civil Procedure, whereas they are third in the order of distribution, should not be given too great weight. It was manifestly an oversight and should not be made a pretext to distort plain, simple language. Fine-spun and attenuated theories of construction and ancient precedents should not be used to work hardships or to lay down harsh rules of law. Many cases of hardship arise under the judicial interpretation of statutes, where the remedy is with the legislature, but I do not think that this is one of that class of cases.

The portion of section 2660 above quoted begins by saying that administration must be granted to the relatives "*entitled to succeed*," etc. After the order of preference among the relatives is indicated, it should be noted that the eighth subdivision of the section says: "To any other next of kin *entitled to share* in the distribution of the estate." The words, "*entitled to share*" are even more specific than the words "*entitled to succeed*," and these words have a meaning that would seem to be beyond doubt or dispute. Both phrases taken together, one in the general clause at the beginning of the enumeration of the different classes or relatives and other in the eighth clause at the end of the enumeration, show with sufficient clearness, it seems to me, a reiterated intention to limit the administration, by the relatives, to those who are actually and presently entitled to share in the estate.

One having an interest in the property of an intestate by reason of his right to share in that property would have every reason and incentive to conserve and protect it in its adminis-

tration, while one who has no legal right to share in the distribution might be more concerned in collecting his commissions or in creating needless expense to the estate by keeping it in litigation for his own gain or for the possible benefit of strangers. The old common law recognized this common sense doctrine and gave the preference in administration to those who had an interest in the estate. Those who had no property interest, though such persons may have been relatives of the blood, were regarded as strangers. *Public Administrator v. Peters*, 1 Bradf. 100, and cases cited therein.

The revisers of our statutes, who prepared the statute from which section 2660 of the Code of Civil Procedure is derived, did not intend to make any change in the law as it then existed in this respect. But, as is often the case, the codifiers worded the statute in a way that gave opportunity for dispute. The statute originally provided that "administration in cases of intestacy shall be granted to the relatives of the deceased who *would be* entitled to succeed to his personal estate." This statute was construed by the Court of Appeals in 1862, in the case of *Lathrop v. Smith*, 24 N. Y. 417, to give the right of administration to *all* relatives of the deceased, in the order named, whether they shared in the distribution of the personalty or not. It was said that relatives who "*would be entitled*" included those who "*might be entitled*."

Since the decision of *Lathrop v. Smith*, the words "*would be*" have been stricken from the statute. I think the omission of these words makes a material difference in the meaning and construction of the statute, and that *Lathrop v. Smith* is, therefore, no longer controlling.

Nor is *Matter of Wilson*, 92 Hun, 318, controlling, though the court there reiterated the doctrine of *Lathrop v. Smith*, notwithstanding the change that had been made in the statute. In the *Wilson* case the court had only to decide that the widow

had the first right of administration under the statute; that the surrogate had no power to construe a separation agreement; that the widow had not renounced her right to administration, and that she was, therefore, entitled to letters of administration. All other matters discussed in the opinion, including the case of *Lathrop v. Smith*, and the principle involved here, were aside from the issues raised.

Matter of Lowenstein, 29 Misc. Rep. 722, decided in this court in 1899, holds to the rule of *Lathrop v. Smith* and the interpretation of that part of section 2660 of the Code of Civil Procedure with which we are herein concerned. The contest in *The Lowenstein* case was between the public administrator and relatives of the intestate who did not share in the estate. In that case the surrogate was not asked to apply the old rule to the contention of two relatives, one of whom had an interest in the estate, while the other had no interest. The opinion in that case expresses and explains the rule that has been heretofore followed in this court whenever this question has arisen. I have felt the weight of the authority of that decision and have been constrained to follow it as a precedent more or less controlling upon me, but upon this reargument I have become convinced that such a rule is harsh and unjust in the present case, where there is no attempt to deprive of the right of administration the only person entitled to share in the estate. There is only \$1,700 in this estate, and the half-brother is the only one of six granduncles and aunts to oppose the application of the grandchild to administer the estate of which he (the grandchild) is the sole beneficiary. The rule now prevailing in this court in such cases has often been used as a means to work injustice through form of law. I have given much thought and reflection to the statute and decisions bearing on the facts of the proceeding before me and I have decided to adopt the rule of *Matter of Seymour*, 33 Misc. Rep. 271, as explained by Surrogate

Silkman in an able and well-considered opinion in a case involving the principle now under discussion.

I can find no controlling decision in any court above this that conflicts with this rule of sound policy and substantial justice. I believe that section 2660 of the Code of Civil Procedure is susceptible of a more liberal interpretation than that given it in *Matter of Lowenstein, supra*, and I have decided to follow that case no longer in the disposition of the many matters of this kind constantly coming before this court. I shall be guided hereafter by the new rule made by this decision.

I hold that under section 2660 of the Code of Civil Procedure administration by relatives in case of intestacy is to be given only to those relatives of the deceased having an actual right at the time of his death to share in the distribution of the estate in the order in which the relatives so sharing are named. In this estate the grandchild is the only person who is entitled to share, and letters of administration must be issued to him, in preference to the half-brother.

Motion for reargument granted, without costs. Submit decree on notice granting letters of administration to John Thomas Brattin.

Decreed accordingly.

BERTHA J. EYSAMAN (Formerly BERTHA J. NELSON), Individually and as Executrix of the Last Will and Testament of FRED G. NELSON, Deceased, Plaintiff, v. WALTER NELSON, KATE PEARCE, IDA W. FENNER, JEANETTE WILLOUGHBY, ELVA W. POMEROY, ROBERT F. LIVINGSTONE, and IRVING EATON, Individually and as Trustee Under the Last Will and Testament of GEORGE NELSON, Deceased, Defendants.

(Supreme Court, Herkimer Equity Term, February, 1913.)

**WILLS—APPOINTMENT OF TRUSTEE TO MANAGE AND CONTROL THE ESTATE
—PASSING OF REMAINDER.**

TRUSTS—ACTION TO SET ASIDE TRANSFERS OF REAL ESTATE.

ACCOUNTING—IN SUPREME COURT—TRUSTEES—EXECUTORS AND ADMINISTRATORS—COMMISSIONS AND COMPENSATION ALLOWED ON.

FRAUD—ACTIONS FOR—SETTING ASIDE DECREE OF SUPREME COURT—ACCOUNTING BY TRUSTEES.

Where the will of plaintiff's father-in-law, who died seized of a large estate consisting of real and personal property, directed that on the death of his widow, the life tenant, the trustee should manage and control the entire estate, receive the rents and income thereof during the life of testator's son and only child, with discretionary power to turn over to him, annually, such part of the income as the trustee might deem expedient, and by the terms of the will, the son, who as the only heir at law and next of kin of his mother became seized of all her estate, took an absolute title to his father's estate subject to be divested thereof in the event that he died leaving a child or descendant him surviving, and, having died leaving no children or descendants him surviving, all of his property and estate, including the remainder in the estate of his father, passed by the will of the son to his wife absolutely.

Where, as part of a concerted plan by the brother and four nieces of plaintiff's father-in-law, aided by counsel and the trustee under a trust for the management of the estate during the life of testator's son to overreach and withhold from plaintiff, an uneducated woman without business experience who married said son,

when she was only eighteen years of age, she without a particle of consideration was induced, in ignorance of her rights, to part with the property which on the death of her husband became hers absolutely subject only to an accounting by the trustee, and, in an action to set aside transfers of said property, the court is satisfied that they were made by plaintiff entirely without knowledge of her rights and continued in such ignorance until long after she had signed away her title thereto, it will be decreed that the transferees of the property at once restore to plaintiff said property and the deeds thereof be set aside; that they be required to account to plaintiff for the use and income of the property for the period during which they have held it, the decree to provide for the protection of innocent parties who have advanced money on the strength of a mortgage given by said transferees to plaintiff.

The trustee, who managed the estate during the life of plaintiff's husband and who continued in possession thereof for several years after his legal right thereto had ceased, was a witness to the will of plaintiff's husband, and acting on his advice she employed his son-in-law to probate the will, which was not contested, and act for her in the settlement of the estate. The brother and nieces of the deceased father-in-law, on the theory that they were his heirs at law, put forth claims which were seconded by the erstwhile trustee and plaintiff's counsel who had his client sign a unilateral agreement to accept a deed from said brother and nieces of an undivided one-half interest in a certain farm free of encumbrance and \$3,500 in cash, and in consideration therefor to convey to said brother and nieces the residue of the trust estate.

About a year after the death of plaintiff's husband, the estate having in the meantime been raided in actions brought annually by the trustee in the Supreme Court for the settlement of his accounts, an action for final accounting of said trustee was brought by his son-in-law as attorney to which action the plaintiff herein, though the only person legally interested in the estate, and the brothers and nieces of her deceased father-in-law, were made parties defendant, and an answer was interposed for plaintiff herein with the manifest design to show that she knew the contents of the complaint and to estop her from afterwards questioning the truth of its allegations concerning the disposition of the trust estate. The final judgment allowed and passed the account of the trustee, approved of his acts as such and, after directing the payment of allowances to the attorneys of the respective parties, decreed, that if sufficient moneys did not remain to pay the commission allowed to the trustee and the expenses incurred by him on the accounting,

and otherwise, he should have a lien on the real estate adjudicated to the pretended heirs of plaintiff's father-in-law and on the income to be derived therefrom in the immediate future, and that he should retain possession of the property and receive the income until payment of his commissions and compensation as allowed. In an action to set aside said judgment for fraud, held:

That the fraud in obtaining the decree in said action was not only on plaintiff but on the court itself, and should be set aside.

That if the transaction relating to the settlement and deed obtained from plaintiff was clean and above board, no decree of the Supreme Court was required to confirm it; but the deal being questionable and the perpetrators believing it needed fortifying, in their efforts to clinch the affair overreached themselves and branded the whole transaction as a fraud.

That the concert of action of the parties engaged in carrying on the trustee's action for a final accounting and its consummation in the decree entered, furnished the strongest kind of evidence of a conspiracy to deprive the plaintiff herein of her property.

That the son-in-law of the trustee, who was made a defendant herein, should restore to plaintiff, with interest, \$3,500 which he took from her as his share of what she received, and the fact that she assigned a mortgage for that amount to the wife of said defendant did not relieve him from liability to make such restoration.

That as all the complaint in the trustee's action asked was the settlement of his accounts, the decree entered therein, so far as it related to the trust estate and purported to adjudicate the title thereto, was no bar to the present action.

ACTION to set aside a deed of real property and to vacate and set aside a judgment.

William S. Rhodes, (Henry V. Borst, of counsel), for plaintiff.

A. M. Mills (Charles E. Snyder, of counsel), for defendants Nelson, Pearce, Fenner, Willoughby and Pomeroy.

Robert R. Livingstone (*in propria persona*), and for defendant Eaton.

MERRELL, J.—This action is brought to set aside a deed of real property in Herkimer county, executed by the plaintiff in March, 1906, and to vacate and set aside a judgment in an action in Supreme Court entered in Herkimer county in April, 1906, in so far as said judgment affects plaintiff or her rights, and for other incidental relief. The plaintiff predicates her demand upon an entire lack of consideration for the conveyance which she, in alleged ignorance of her legal rights in the premises, executed and that said deed and judgment were obtained through a fraud practiced upon her by the defendants. The facts are somewhat complicated and require a detailed recital.

In May, 1892, one George Nelson died, a resident of and seized and possessed of valuable real and personal property in Herkimer county, consisting of two large dairy farms and a half interest in a third, together with stock and personal property thereon, and bonds, mortgages and other personal estate. He left him surviving his widow, Elnora Nelson, and one child, a son, Fred Nelson. He was also survived by a brother, the defendant Walter Nelson, and by four nieces, the defendants Kate Pearce, Ida W. Fenner, Elva W. Pomeroy and Jeanette Willoughby, daughters of a deceased sister. He left a last will and testament which was duly admitted to probate in the Surrogate's Court of Herkimer county on the 17th day of June, 1892. By said will the testator gave to his widow, Elnora Nelson, the use of all his real and personal estate during her lifetime, and named his said widow sole executrix of said will. The testator then named one James D. Feeter, of Little Falls, N. Y., as trustee of his estate, to take possession of all of his property, real and personal, *in trust*, to take effect at the close of his widow's life, and to manage and control the same and to receive the rents and income thereof during the lifetime of testator's son, Fred G. Nelson, with power in said trustee to pay and turn over to the said son, Fred, such sum from said income

annually as said trustee might deem expedient and beneficial to said son during the latter's lifetime. Said will further provided that the principal and body of testator's estate remaining at the close of the life of testator's said son should be divided equally among his children or the heirs of the same, should said Fred G. Nelson die leaving lawful child or children or descendants of such child or children, they to take the same *per stirpes* and not *per capita*. The will contains no further provision as to the disposition of the remainder of testator's estate after the death of Fred G. Nelson than as stated.

The testator left two large farms, one of about 225 acres, known as the Danube farm, one of about 326 acres, known as the Homestead farm and upon which the testator and his family resided. He also owned a half interest in a farm known as the Churchill farm, of about 125 acres, his wife, Elnora Nelson, owning the other half interest therein, the husband and wife owning the said farm as tenants in common and not as tenants by the entirety. The wife's undivided half interest in the Churchill farm was incumbered by a mortgage thereon held by testator for \$2,265.

The entire estate of testator at the time of his death amounted to about \$60,000. Immediately upon his death testator's widow took possession of all his property and estate and managed the same and enjoyed the use thereof until her death, which occurred March 9, 1897. Elnora Nelson died intestate leaving as her only heir-at-law and next of kin her surviving the son, Fred. G. Nelson, and thereupon the said Fred G. Nelson became seized of his mother's half interest in the Churchill farm, subject to said mortgage thereon held by his father's estate, and also of such personal estate as his mother left.

On March 13, 1893, the plaintiff married Fred G. Nelson, and went to live with him and his mother on the Nelson Home-

stead farm, and continued to reside on said farm until after her mother-in-law's death, when she, with her husband, moved to the city of Little Falls. At the time of her marriage, plaintiff was eighteen years of age. Her education was limited to what she received at common school, she never having attended high school, and it would seem was wholly without business experience.

Upon the death of Elnora Nelson, the widow of George Nelson, when the trust provided in the latter's will became operative, the trustee, James D. Feeter, named by testator, declined to qualify. Thereupon such proceedings were had in the Surrogate's Court of Herkimer county that the defendant Irving Eaton was appointed trustee of said will in place of said Feeter, and said Eaton immediately qualified as such trustee and took possession of all of the property of said estate. Thereafter during the lifetime of Fred, the said trustee managed said farms and acted as such trustee under said will. The title to the stock on the farms had largely passed to Fred as next of kin of Elnora Nelson or otherwise, and this stock he voluntarily transferred to said trustee upon the latter's agreement that upon Fred's death it should be returned to the representatives of his estate and be disposed of under his will.

Fred G. Nelson, plaintiff's husband, died March 15, 1905, leaving no children or descendants. He left a will devising and bequeathing to the plaintiff, his widow, all of his property and estate, which will was on the 29th day of May, 1905, duly admitted to probate in Surrogate's Court of Herkimer county as a will sufficient to pass the real and personal estate of the testator. This will was executed on October 8, 1900. The defendant Irving Eaton was a witness to its execution. Under well-settled principles of law, Fred G. Nelson, by the terms of his father's will, took an absolute estate in all of George Nelson's property, real and personal, subject to be divested thereof

only upon the event of the son's leaving a child or descendant him surviving, and upon the death of Fred. G. Nelson without leaving children or descendants him surviving, all of his property and estate, including all the remainder of the estate of George Nelson, deceased, passed under Fred's will to the plaintiff absolutely.

That the plaintiff was entirely ignorant of her legal rights or that upon her husband's death she acquired any interest in the property and estate of George Nelson, deceased, seems entirely apparent. It is equally clear that however ignorant she may have been, or whatever pretended claims thereto may have been advanced by persons not legally entitled to share therein, the legal title to the remainder of the George Nelson estate passed to the plaintiff under her husband's will as fully and perfectly as did his half interest in the Churchill farm which came to him from his mother, or any other of his personal estate. The contingency of the *cestui que trust* dying leaving descendants not occurring, the entire estate of George Nelson, deceased, upon Fred's death passed to the latter's estate and to plaintiff under his will. Upon this proposition the law had for many years been well settled and recognized as sound legal doctrine. *Matter of Kane*, 2 Barb. Ch. 375; *Tompkins v. Verplanck*, 10 App. Div. 572; *Simonson v. Waller*, 9 id. 503; *Clark v. Cammann*, 160 N. Y. 315; *Doane v. Mercantile Trust Co.*, 160 id. 494.

After Fred G. Nelson's death, the defendant Eaton, who had been made trustee of the George Nelson estate, and who had had the management thereof during Fred's life, and who had acted as one of the witnesses to his will, undertook to advise plaintiff and counseled her to employ the defendant Robert F. Livingstone, who was Eaton's son-in-law, to act as her attorney in the proceeding to probate her husband's will and in the settlement of his estate. As before stated, the plaintiff was an un-

educated woman, without business experience, and naturally was quick to accept the counsel thus proffered by one who had been so intimately connected with the business affairs of the family. She employed Livingstone as her attorney. That plaintiff from thenceforth relied implicitly upon her said attorney, the wisdom of his counsel and his devotion to her cause, succeeding events conclusively show.

Upon the death of Fred, the *cestui que trust*, all title of Eaton, the trustee, in the trust estate at once ceased. His only office remaining was to account for his acts as trustee and to turn over to the legal representatives of Fred any net income remaining in his hands undistributed and any personal estate in his possession. The real estate held by him in trust passed by operation of law, and no act on the part of said trustee was required to effectuate such transfer. Notwithstanding the clear limitations of his legal authority, the trustee did hold possession of the trust estate, real and personal, for about two years after his legal right thereto had ceased.

As before stated, the stock upon the farms belonged to plaintiff's husband, and under his will passed to her. This stock she sold in the fall after her husband's death to the brother of George Nelson and the nieces, who, as plaintiff was advised, inherited all the George Nelson estate upon her husband's dying without leaving descendants. Such claims as this brother and these nieces were putting forth for this property were seconded by the erstwhile trustee and plaintiff's counsel, no one seeming to question their right thereto, nor to bestow a passing thought upon the rights of the real owner. Eaton and Livingstone thought plaintiff might as well sell her cows and stock which were then on the Homestead and Danube farms to the defendants Nelson, Pearce, Fenner, Pomeroy and Willoughby. For this stock the purchasers paid Livingstone, plaintiff's attorney, \$3,200, received from the proceeds of a real estate mortgage,

known as the Hunt mortgage, and which was a part of the trust estate of George Nelson, deceased, and which mortgage was in fact owned by the plaintiff herself. Thus we have the anomalous condition of the Nelson heirs (so called) purchasing and receiving \$3,200 worth of personal property of plaintiff and paying for it with money which belonged to her—an exceedingly profitable transaction to the purchasers. This \$3,200 of plaintiff's money which had been paid to her for her stock was used by Livingstone to discharge debts and obligations owing by plaintiff's husband's estate, with the exception of a balance of about \$200 turned over to plaintiff.

Matters drifted along, the defendants Walter Nelson et al., apparently secure in their ownership of the George Nelson estate, the trustee Eaton still in possession and the plaintiff, the real owner, in entire ignorance of her rights, until late in January, 1906, when Livingstone writes the plaintiff, warning her against signing any papers without first consulting him or taking good counsel. Evidently plaintiff's curiosity was aroused by this missive, for she at once proceeded to her attorney's office. As to just what occurred there at Livingstone's office there is some dispute. The plaintiff testifies that the attorney told her that, while she had no interest in the George Nelson property, he might be able to scare them (meaning the brother and nieces) into giving her something. Plaintiff testifies that she told him on this occasion that if he could get anything for her she would be willing to share with him, and that he told her he wouldn't ask her to share with him, but he would ask her a large fee probably. Shortly after, plaintiff again called at her attorney's office, and she testifies that he then told her that he thought he could get some of the George Nelson property for her, and that he hoped the Nelson heirs would employ Senator Mills; that he might get it easier from Senator Mills than other local attorneys whom the heirs might employ; that Sena-

tor Mills thought that plaintiff ought to have some of the property. Plaintiff testifies that she again called upon her attorney a few days later and that he then told her he thought he could scare them into giving her something by tying up the property in litigation.

Livingston gives a somewhat different version of these consultations with his client. He testifies that while he was making preparation to draw the final account of his father-in-law as trustee of the George Nelson estate in January, 1906, and just prior to writing plaintiff the warning letter of January 25, 1906, and as he was for the first time examining George Nelson's will, the idea came to him that Fred Nelson might have taken more than a life estate under his father's will, and that when plaintiff first called at his office late in January, 1906, he advised her that he thought possibly there was a question whether Fred Nelson was not entitled to the remainder of the George Nelson estate; that later he looked it up further and wrote plaintiff a letter on February 6, 1906, as follows:

"February 6th, 1906.

"MRS. BERTHA J. EYSAMAN,

"West Main Street,

"Little Falls, N. Y.:

"MY DEAR MRS. EYSAMAN.—I wish you would come in and see me about the Nelson trust estate matters. Mr. Eaton is anxious to make his accounting and be discharged and the Nelsons are urging him to do so and turn the property over to them.

"You should take some decided stand in the matter, and if not everybody should be made a party in the action to settle his accounts and the contention as to ownership tried out there. If you take some positive action now, it can be settled first, and then Mr. Eaton can make his accounting without any

trouble, or litigation and as he is getting along in years I would like it if he could avoid further trouble and annoyance in the matter.

"I have thought over the George Nelson will and looked it up some, and I am of the opinion that Jones was right when he said you would receive all the trust property from Fred under his will if he died without children. It was his property if he died without children, and he wills it all to you; his father did not dispose of it to any one else beyond Fred's children, if he had any.

"I wish you would let me know just what you intend to do right along, as Mr. Eaton must have his accounts settled soon.

"Yours respectfully,"

Livingstone, while testifying that he wrote this letter, does not claim to have mailed it, but testifies he delivered it to his stenographer for mailing. He does testify that the day following, February seventh, plaintiff called at his office and said she had received his letter. Livingstone testifies that he then told her substantially what he had written in the letter, and that plaintiff then told him that if he thought it was hers to go ahead and see what he could get out of it for her and that she would give him half of it. Livingstone testifies that he replied that he would not say anything about that then, but would have to think it over.

Plaintiff denies any remembrance of ever having received the letter which Livingstone claims to have written on February 6, 1906, and denies that he ever told her that she had any legal claim to the George Nelson property, and insists that the first intimation she ever had that the property passed to her upon her husband's death was shortly before the commencement of this action in 1911.

It is quite essential in the determination of this controversy to

discover where the truth lies as to the advice which Livingstone gave his client in January and February, 1906. Did he advise her that she in fact was entitled to the George Nelson estate remainder? Did he write the letter of February 6, 1906? Or is he mistaken in having been fully informed of plaintiff's legal rights in the premises and in having advised plaintiff with reference thereto?

The alleged letter of February 6, 1906, contains some peculiar features. The plaintiff lived in the same city as her attorney and but a short distance from his office. At that time she appears to have been a very frequent caller at his office, counseling with him as to her various legal matters. To say the least the letter is very formal under all the circumstances. If it was in fact written and sent and if on the day after, on February 7, 1906, plaintiff called at the attorney's office and was informed of her absolute right to all the George Nelson remainder, the attorney must have been fully aware that she was legally entitled to all the property and that her title thereto was perfect and must ultimately prevail. And yet, on February 10, 1906, four days after writing this most formal letter to plaintiff, evidently in the interest of Eaton, and but three days after the last mentioned interview, Livingstone did write plaintiff as follows:

Feby. 10, 1906.

"MY DEAR MRS. EYSAMAN.—If you will call at my office I will talk over your proposition to me about taking case of your claim to Nelson estate, as I see no reason why I should not take it as suggested by you.

"Yours sincerely,

"ROBT. F. LIVINGSTONE.

"To MRS. B. J. EYSAMAN,

"Little Falls, N. Y.

"P. S. Excuse this scribble, but my stenographer has gone for the day."

In this letter he speaks about taking the case of "*your claim to the Nelson estate*," and sees no reason why he should not take up her proposition as to a division. On February 6, 1906, Livingstone claims to have written plaintiff that in his opinion she would receive the entire trust estate. Livingstone testifies that when plaintiff called in response to his letter of February 10, 1906, he told her he had been thinking over her proposition and had decided to take her up and "*would go ahead and look it up*."

On February 15, 1906, Livingstone prepared an agreement which was executed by plaintiff and acknowledged by her on February 22, 1906. That agreement is as follows:

"RETAINER AND AGREEMENT.

"WHEREAS, I, Bertha J. Eysaman, as widow of Fred G. Nelson, and sole legatee and devisee under the will of said Fred G. Nelson, deceased, claim to have an interest in the property constituting the estate of George Nelson, deceased, and which interest and right is in some doubt and is uncertain, and is denied and contested by the heirs-at-law of said George Nelson, deceased, who claim the whole of said Estate,

"Now therefore, I do hereby retain Robert F. Livingstone of Little Falls, N. Y., to appear for me and act as my agent and attorney in bringing about and negotiating a settlement of my said claim and interest; and I hereby empower and authorize him to compromise and settle said claim and adjust the same with said heirs, as in his judgment seems just and advantageous, and I agree not to settle or compromise the same without the consent of my said attorney. I agree to pay said Livingstone

for his services and expenses therein in making said settlement and compromise a sum equal to one-half the total amount of money received or recovered by me and one-half the total value of any and all property recovered or received by me or turned over to me on such settlement or compromise, and I agree to pay my said attorney and agent in cash therefor, or, at his election, to sell and convey to him therefor an equal undivided one-half unencumbered interest in all moneys, and property (real and personal) recovered, received or turned over to me on such settlement or compromise.

"I further agree that my said attorney shall have a special lien upon all such moneys and property and the subject matter of said Trust Estate for his fee, pay and services aforesaid.

"Witness my hand and seal this 15th day of February, 1906.

"BERTHA J. EYSAMAN [L. s.]

"STATE OF NEW YORK, }
"COUNTY OF HERKIMER, } ss.:

On this 22d day of February, 1906, before me, personally appeared Bertha J. Eysaman, to me known and known to be the person described in and who executed the foregoing instrument, and duly acknowledged to me that she executed the same; and who, being by me duly sworn, did depose and say, that she was acquainted with the foregoing instrument and understood the terms thereof and had read over the same.

"WILLIAM S. RHODES,

"Notary Public."

If Livingstone was aware, as he claims to have written plaintiff February 6, 1906, and claims to have repeatedly advised her, that she was legally entitled to all of the trust estate, why was he, two weeks later, making her say that she *claimed* "to have an interest in the property constituting the estate of

George Nelson, deceased, and *which interest and right is in some doubt and is uncertain*”—a most remarkable position for one to take who had received the information and advice that Livingstone claims to have given plaintiff.

Again, it seems incredible that any one in the possession of her natural faculties would voluntarily turn over half a large estate when advised that the whole estate is hers absolutely. And further, Livingstone, if he possessed the accurate knowledge of plaintiff's right to the entire trust estate that he professes to have had, must have known that any such agreement to share in the estate as he prepared and plaintiff executed would have been brushed aside, at once the matter was brought to the attention of any court, as quite unconscionable. *Turnbull v. Banks*, 22 App. Div. 508; *Matter of Holland*, 110 id., 799.

And if Livingstone clearly understood and advised plaintiff of her right to take the entire trust estate, why did he, on March 2, 1906, prepare and have his client sign an unilateral agreement whereby she was to accept a deed from the brother and nieces of George Nelson of the undivided one-half interest in the Churchill farm, free of incumbrance, and \$3,500 in cash, and in consideration thereof convey to the brother and nieces the residue of the trust estate? If he knew she was entitled to the entire estate, why did he sanction the taking from her of seven-eighths of the estate by those who had not the shadow of title thereto? Livingstone as a lawyer must have known that his client was entitled to the whole if she was to a part. If he did not know his client's rights, he was guilty of gross malpractice in permitting her to voluntarily relinquish her rights. Livingstone testifies that he examined the authorities and looked up the law. It is almost inconceivable that he did not learn plaintiff's rights if he made the study of the matter which he claims. But if he did, it is just as inconceivable that he would have permitted his client to have been deprived of her property as she

was. A charitable view is that Mr. Livingstone failed to quite appreciate the legal status of his client and with her became the prey of others better informed than he, who, with a bold front and through fictitious claims positively asserted and insisted upon, were able to lull suspicion and obtain the bulk of the estate.

The plaintiff testifies that the most Livingstone claimed to her was that he might be able to "scare" something out of the brother and nieces by threatening to tie up the estate in litigation. I am of the opinion that her version of the matter and of the advice of her attorney tallies much more satisfactorily with the admitted facts and circumstances than that of the attorney. Her version of the advice given her, of her offer to divide what might be gotten out of the brother and nephew by scaring them, of Livingstone's statement of Senator Mills' generous impulse toward plaintiff, is in entire harmony with Livingstone's note to plaintiff of February 10, 1906, asking her to call with reference to her proposition about *her "claims to Nelson estate,"* with the agreement itself which plaintiff executed, bearing date February 15, 1906, in which he has her recite that she *claims "to have an interest in the property* * * * *which interest is in some doubt and is uncertain,"* and is in absolute harmony with succeeding events when a "settlement" was reached whereby plaintiff yielded up a valuable estate for little more than a pittance.

By the agreement of March 2, 1906, the plaintiff agreed to convey unto Walter Nelson, the brother, and Elva Pomeroy, Ida Fenner, Kate Pearce and Jeanette Willoughby, nieces of George Nelson, deceased, who were posing as claimants to the trust estate, all her interest individually and as executrix of her deceased husband's estate in said trust estate, including the Danube farm, the Nelson Homestead farm and all the personal property of said trust estate for the sum of \$9,515. This con-

sideration was to be paid by the conveyance by Walter Nelson and the nieces of the undivided one-half interest in the Churchill farm owned by George Nelson at his decease, and to satisfy a mortgage of \$2,265 held by him at his decease against his wife's half interest in said Churchill farm, and to which half interest plaintiff had succeeded, and to pay to plaintiff in cash, or to secure the payment to plaintiff by first mortgage upon either the Danube or Homestead farm, the sum of \$3,500. Subsequently this agreement was carried out. The plaintiff received a deed of the half interest in the Churchill farm of which she had been, since her husband's death, the owner, the brother and nieces went through the form of discharging a mortgage which passed to plaintiff at her husband's death and which undoubtedly merged in her superior title. The mortgage for \$3,500 was given and this was taken by Livingstone as his share under his agreement with plaintiff. And plaintiff on her part conveyed to the brother and nieces the two large farms with all personal property thereon and all that remained of the trust estate.

If Livingstone knew that his client was legally entitled to the entire trust estate, how could he permit her to sign away an estate rightfully belonging to her worth \$40,000 for a farm of 125 acres which in the transaction was figured to be worth \$3,750? Upon doing this, how could he justify himself in taking from her \$3,500 in cash?

In these transactions Livingstone was either ignorant of his client's legal rights and was misled into giving her incorrect advice, or he was a party to a scheme to deprive her of her rights. If he fully appreciated his client's rights his conduct can bear but one interpretation.

An interesting side light on this controversy is revealed by the manner in which the estate was handled by the trustee Eaton, the father-in-law of Livingstone and an adviser of plaintiff. As before stated, on the refusal of the trustee named by

the testator to qualify, Eaton was, on April 15, 1897, appointed by the Surrogate's Court of Herkimer county trustee under said will. Eaton at once qualified and entered upon the discharge of his trust. Commencing in December, 1899, said trustee annually accounted for his acts. These annual accountings were not had in the Surrogate's Court of Herkimer county, where the trustee was appointed and where the expense of such proceeding would have been comparatively small, but said trustee annually brought an action in the Supreme Court for the settlement of his accounts. And annually a formal summons and complaint is prepared and served upon the *cestui que trust*. No answer is interposed by the *cestui*, in most instances, or, if a so-called answer is served, it is a mere perfunctory affair admitting the complaint, and the trustee and his attorney and an attorney for the *cestui que trust* each year appear before Mr. Justice Scripture and the trustee's accounts are formally approved, and a decree granted passing the account with allowances to all concerned. The judgment rolls show that the complaint is verified and with the summons served upon the *cestui*, who in turn "appears" by an attorney and all hands proceeding to a court held by the same justice each year the decree and allowances are obtained—all within a period of a day or two. By the decree in the first annual action to account the commissions of Eaton, as trustee, are allowed at \$412.49, and an allowance for "Additional Expense" of \$400 was made. The attorney for the trustee was allowed \$350 for his services. The attorney for the *cestui que trust* was allowed \$100 and "W. W. Cooper, accountant," \$400. In view of the generous treatment accorded to all concerned, it is not strange that the necessity was felt for annual actions in the Supreme Court to account.

The second annual accounting occurred in February, 1901, when another action in Supreme Court was brought by the

trustee. Again the pilgrimage to the same court is made, the trustee's accounts are passed, the trustee is allowed by the court commissions to the amount of \$198.92, "Additional Expense," \$130; the attorney for the trustee is allowed \$187, and the attorney for Fred, \$100.

The next annual action for an accounting culminates in a decree granted by the same court, in which the following allowances are made: Commissions to trustee, \$155.01; additional expense, \$175; attorney for trustee, \$190; attorney for Fred, \$100.

The fourth annual action to account followed the course and expedition of its predecessors, and was brought to the court's attention in January, 1903, with the result that the trustee's accounts were passed with the following allowances: Eaton, trustee, commissions, \$195.96; "additional allowance," \$175; attorney for trustee, \$175; attorney for Fred, \$50.

The fifth annual action was brought before the court in February, 1904, and by the decree entered therein the following allowances were made: Eaton, trustee, commissions, \$195.58; "additional allowance," \$175; attorney for Fred, \$50; Livingstone, attorney for Eaton, \$175.

The last action to account prior to the death of the *cestui que trust* was in January, 1905. The same forms were observed in this action as in those that preceded it. The action was brought by Livingstone as attorney for the trustee; the *cestui que trust* was represented by attorney, who admitted the allegations of plaintiff's complaint and all hands proceeded to Justice Scripture's court to obtain the adjudication, and a decree is granted approving of the trustee's accounts and making the following allowances: Eaton, trustee, commissions, \$182.75; "additional expense," \$200; Livingstone, as attorney for trustee, \$175; Shall, attorney for Nelson, \$50.

In none of these actions does a single item of the trustee's

expense appear. As the basis for such annual allowances as \$175, \$200 and \$400 the trustee merely files an affidavit that he, in the discharge of his duties as trustee, has kept a horse, wagon, sleighs, etc., and has expended therefor at least the flat sum which he is allowed. That the trustee, his attorney and the attorney for the *cestui* were working in entire harmony is evidenced by the fact that the last annual decree appears to have been fully prepared, containing proposed allowances, and was "O.K'd" by the attorney for the trustee and *cestui*, thereby signifying their willingness to be allowed the sums asked for.

When one reflects that there is no law requiring any annual accounting by a testamentary trustee and that the evidence in this case is barren of any reasonable excuse for the annual rests that were taken, and when one further reflects that the Surrogate's Court of Herkimer county has ample jurisdiction to entertain proceedings to account by trustees, and that it is to such tribunal as that from which their appointment came that trustees almost universally apply for settlement of their accounts, and where, if the trustee honestly felt that he would be best protected by annual settlements in court, such accountings could be carried through at an expense of from \$25 to \$40 for each accounting, the conduct of this estate shocks one's sense of right. Without the slightest authority or legal warrant, flat sums ranging from \$130 to \$400 are annually allowed to the trustee by way of "extra expense" and "extra allowance," and not an item showing the nature of such expense. These additional allowances are alone supported by affidavit of the trustee to the effect that he has kept a conveyance and used it in the discharge of his duties—an item of expense which clearly cannot legally be allowed him. *Pullman v. Willets*, 4 Dem. 536; *Matter of Ingersoll*, 6 id. 184. This doctrine has never been questioned.

The trustee's attorney is annually allowed sums ranging from \$175 to \$350—amounts out of all proportion to what he could have possibly earned; and even the attorney for the poor *cestui* is annually given a substantial allowance for appearing in court and admitting the allegations of the complaint; and an accountant performing services for which the trustee was paid is allowed, without any warrant in law, the generous sum of \$400 for his services.

It seems incredible that such a condition of affairs could have existed as is revealed in this case. That a court could have been so imposed upon—that one sworn to serve in a position of trust over an estate should have been a party to such annual raids as were made upon the estate in his keeping passes all understanding. And in the face of all this we find upon a provision in the decree in the final accounting, after the death of the *cestui que trust*, that the trustee, “having honestly and fairly administered his said trust and managed the trust property for the best interest of said estate, he is hereby allowed commissions and compensation for the same to the amount of Six Hundred Seven and 54/100 Dollars, (\$607.54), and for expenses incurred by him on this accounting and otherwise,” and authorizing said trustee to retain possession of the trust real estate until he receives the full amount of such commissions and compensation; and Livingstone, as his attorney, is allowed five hundred dollars for his services and expenses.

While it is true that the Supreme Court had jurisdiction to hear these annual accountings, yet, in the light of other circumstances in this case, it would look very much as though the trustee, who had been favored with such generous treatment by way of “extra expense” and “extra allowances,” or his attorneys, who found these annual excursions so much to their profit, were attending as fully to their own interests as they were to the protection of the estate in their charge. How

profitable the connection of the trustee and his counsel with this estate was may be seen when the total fees allowed them in the annual accountings for the years 1899 to 1904, inclusive, amount to \$4,697.71. Who would have possibly been injured had none of these actions been brought? The *cestui* was not troublesome, for he annually consented to the accounts as rendered. Never was an item of the trustee's accounts disputed.

It is not strange in the light of the disclosures in this remarkable case that in times of unrest unthinking people charge the entire legal profession with knavery, and the demagogue be able to so influence the public mind as to destroy confidence in our courts and to create a considerable sentiment for the recall of judicial officers.

While perhaps the administration of the Nelson trust estate may have little bearing upon the issues in this action, yet the spirit of avarice displayed in the course thereof is in entire keeping with the treatment accorded this plaintiff when the trust estate passed to her. Eaton, the trustee, was in charge through it all, and led in advising plaintiff that she could claim no interest in the trust estate, not having had a child by Fred Nelson. The trustee's son-in-law was the favored attorney in the last two annual accountings, and he it was that engineered the final adjustment so disastrous to his client, but profitable to himself.

In December, 1905, Eaton consulted with Livingstone about making his final account as trustee, and the latter began the preparation of said account. Livingstone then suggested to plaintiff that such accounting must be had and that thereon he would act for the trustee and that she must have some one appear for her. Thereupon, on December 18, 1905, at Livingstone's suggestion, the plaintiff employed Mr. Frank Shall, a young attorney in Livingstone's office, or in an office adjoining and communicating with the office of Livingstone. Not only did

the plaintiff thus employ Shall, but a formal retainer was prepared and typewritten by the Livingstone-Shall stenographer and signed and acknowledged. This instrument, prepared and executed with such formality to employ an attorney to appear on an accounting, reads as follows:

“SUPREME COURT. HERKIMER COUNTY.

“In the Matter of the Judicial Settlement and Trusteeship of Irving Eaton, as Trustee under the Last Will and Testament of George Nelson, deceased.

“I, Bertha J. Nelson, of Little Falls, N. Y., widow of Fred G. Nelson, deceased, the son of said George Nelson, deceased, do hereby retain Frank H. Shall, Attorney at Law, of Little Falls, Herkimer county, N. Y., to appear for me as my attorney in the above entitled matter, now or whenever the said accounting and settlement shall be made or begun, and to look over and pass on the same and to take such steps or proceedings as he may deem desirable therein for me and in my interest. I hereby agree to pay said attorney a reasonable amount for and in consideration of his services and his expenses therein.

“Witness my hand and seal this 18th day of December, 1905.

“BERTHA J. NELSON,” [L. s.]

“STATE OF NEW YORK,
“COUNTY OF HERKIMER,
“CITY OF LITTLE FALLS. } ss:

“On this 18th day of December, 1905, before me personally appeared Bertha J. Nelson, to me known and known to be the person described in and who executed the foregoing instrument, and she thereupon duly acknowledged to me that she executed the same.

“WILLIAM S. RHODES,
“Notary Public.”

It will be noted that the employment of Shall was only in relation to the judicial settlement of the accounts of Eaton as trustee. And, indeed, Shall testifies: "That retainer was more to look after the accounts of Eaton, as trustee, his management of the farm." But we shall see later on how little regard was felt for the limitation of this retainer. In the negotiations which were carried on subsequently to the making of the agreement of February 15, 1906, whereby the plaintiff retained Livingstone to negotiate a settlement with the Nelson heirs and had agreed to divide with him whatever could be realized, the plaintiff took no part, Livingstone exercising unlimited authority in the premises. The brother and nieces of George Nelson were represented by A. M. Mills, of Little Falls, N. Y., an attorney of conceded ability and for many years a leader at the bar in central New York. Senator Mills appears to have been given entire control of the negotiations in behalf of his clients. That he fully understood that those he represented had legally no claim to any part of the trust estate and that as a lawyer, whose legal attainments were such that he could not have been in ignorance of well-settled principles of law, he fully appreciated that the plaintiff was entitled to the entire trust estate, hardly admits of doubt. Indeed, Senator Mills' connection with the transaction shows conclusively that he fully appreciated the legal status of the parties. The record is barren of evidence showing that he ever claimed that his clients were entitled by law to any part of it. Mr. Millard N. Pearce, the husband of the defendant Kate Pearce, one of the nieces, and who seems, in a way, to have represented the four sisters, of which his wife was one, when testifying as a witness in behalf of defendants and in response to a question by the court as to whether Senator Mills had advised the defendant heirs as to their legal rights, answered: "He never told me that, no sir." On being further pressed, Pearce testified: "He (Mills) never

told me who owned the property; he said it was a question." Senator Mills, as a witness, failed to testify that he had ever advised his clients that they had any claim in law to any part of the George Nelson trust estate. And nowhere in the answer of the Nelson heirs to the complaint of Eaton, as trustee, in his final action to account, which Senator Mills prepared and himself verified as attorney for said heirs, does he allege or claim that his clients owned any part of the trust estate in question. And in the deed to plaintiff of the undivided half of the Churchill farm, which was drawn by Senator Mills, he was careful to have his clients merely remise, release, grant and convey to plaintiff without covenants of title or warranty, except against the grantors' own acts. The strongest position that Senator Mills seems to have taken at any time during the negotiations or since was that his clients claimed to be entitled to the trust estate. And the answer of the Nelson heirs in the accounting action does not go so far as to allege even a claim of ownership in said defendants, but alleges that this plaintiff claimed she had some dower right or greater interest therein, and over which there was a contention. The absence of any claim of ownership coupled with the fact that Senator Mills himself verified the answer in behalf of his clients is not without significance.

There is an abundance of proof in the case that the Nelson heirs were putting forward claims to the property in question, and that everyone who had any relations with the plaintiff, the Nelsons, the trustee Eaton, and Livingstone, were always voicing the idea that plaintiff had no interest in the trust estate. Even her own husband and her mother-in-law, Elnora Nelson, had told her that her interest depended entirely upon her giving birth to children by Fred. She was never consulted about the management of the trust estate, and never saw the George Nelson will until the year 1911. Under such circumstances it

is not strange that plaintiff never dreamed of her actual rights.

Were the Nelson heirs in ignorance of plaintiff's rights, and were their so-called claims to have succeeded to the trust estate by inheritance as heirs at law of George Nelson, deceased, advanced in the belief that they were founded upon law and right? In other words were their "claims" based upon belief in their justice? Clearly not. It does not appear that their counsel ever so advised them. Indeed, Pearce testifies: "*He never told me who owned the property; he said it was a question.*" Unquestionably they were putting forth claims and insisting upon them with almost suspicious reiteration. It is not unlikely that promptings of avarice caused them to regard their own claims as the only blood relatives of George Nelson as superior to the legal rights of plaintiff, an uneducated woman whose only claim came from an alliance by marriage with a dissolute son of their kinsman; and that that son having died as the result of his excesses without leaving children, their sense of equity eliminated the plaintiff, a stranger to them, from sharing in the property. Quite likely through the indulgence of such reasoning they were able to justify themselves in claiming the property. That they had no honest right thereto they well knew.

In representing his clients in the transaction and the negotiations which resulted so profitably to them, Senator Mills was their agent. For what he said and did those whom he served must be held responsible. The fruits of his efforts were for their enjoyment. He was given paramount authority to act. The principals ratified their agent's acts and must adopt as their own the instrumentalities by which they were consummated. *Elwell v. Chamberlin*, 31 N. Y. 611; *Meehan v. Forrester*, 52 id. 277; *Adams v. Mills*, 60 id. 539; *Crans v. Hunter*, 28 id. 389.

Mills knew where the legal right to the trust property re-

posed. If Livingstone, who assumed to look after the interests of plaintiff, knew, then but little is required to spell collusion. But if plaintiff's counsel was ignorant of the rights of his client, which, it seems to me, considering all the evidence, is far more probable, then plaintiff, in her ignorance, through false representations judiciously put forth, was led to believe that she had no right to the trust estate, and was induced to part with her valuable rights, and to believe that the half interest in the Churchill farm had been "scared" out of the Nelson heirs by her attorney.

The negotiations appear to have, for the most part, occurred at Senator Mills' office, to which Livingstone made frequent pilgrimages. Livingstone was seeking Mills—quite out of harmony with his present claim that he regarded plaintiff's rights as clear. That Mills was able to exercise a strong influence over plaintiff's representative is plain.

The evidence shows to my satisfaction that the transfers were made by plaintiff under a mistaken idea of her legal rights, or rather, in an entire absence of knowledge concerning them. While equity will not relieve for a mistake of law, no other elements being present, yet in cases of fraud the rule is different. As stated by Finch, J., in *Haviland v. Willets*, 141 N. Y. 35, 50: "It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct, which tends to confirm the mistake, and conceal the truth, it is the right and duty of equity to award relief." Also, to same effect, *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49, 54.

As a lawyer, Senator Mills may not have been called upon to reveal to his adversary, if such he was, any weakness or infirmities concerning the "claims" which he asserted his clients were making, nor to enlighten opposing counsel as to plaintiff's rights. *Ward v. Town of Southfield*, 102 N. Y. 293.

But his clients should not be permitted to retain property which they were able to obtain by reason of plaintiff's ignorance.

If anything more is required to show that there was a concerted plan to overreach this unfortunate plaintiff, it is furnished by the events which followed close upon the making of the agreement of division of the trust estate, and, indeed, before the deeds had actually passed.

Early in April, 1906, the trustee, Eaton, launches the much-heralded action to finally account for his acts as trustee. The *cestui*, Fred G. Nelson, had been dead for over a year, during which period Eaton had remained in the possession and management of the trust estate. Assuming that Livingstone tells the truth when he says he knew plaintiff had legally succeeded to the entire trust estate, what was the necessity of any formal accounting? The real estate took care of itself. By law it passed to the plaintiff. After the death of Fred, the trustee had no control whatever over it. All that was necessary for him to do was to sit down with Fred's widow and account for his acts since his last previous accounting—a period of only a few months. Had he followed such a course, who could have objected? Absolutely no one. He does not apply to the Surrogate's Court of Herkimer county, from which his appointment emanated, but he once more brings action in the Supreme Court, which in the past he has found so satisfactory. The excuse offered by counsel for defendants, for not proceeding in Surrogate's Court, that Judge Livingstone, the attorney for the trustee, was at the time surrogate of Herkimer county by appointment, and was therefore disqualified from passing upon his father-in-law's accounts, is more ingenious than satisfying. The Code authorizes the district attorney to act in any case when the surrogate is disqualified, where there is no special surrogate or county judge who can serve. And it is somewhat

strange that, in so carefully observing the ethics of his official position, the attorney for the trustee should have entirely overlooked the plain provisions of section 2495 of the Code of Civil Procedure, prohibiting a surrogate from acting as an attorney or counsel in a civil action or special proceeding for or against a testamentary trustee over whom or whose estate or accounts he could have any jurisdiction by law.

In the Supreme Court action which Livingstone brought for the trustee the summons bears date March 29, 1906. Notwithstanding the fact that he claims to have known that plaintiff alone was legally interested in the trust estate, Livingstone joins with her the defendants Walter Nelson, Kate Pearce, Ida W. Fenner, Elva W. Pomeroy and Jeanette Willoughby as parties defendant. The complaint is verified on the third day of April, 1906, and, considering that this is simply an action to account on the part of the trustee seeking to be relieved from the responsibility of his trust, it is a most remarkable document. The pleading starts off with a recital of the facts leading up to the appointment and qualification of the plaintiff, as trustee, and his entry upon the discharge of his trust. Then follow extended allegations of the several Supreme Court actions for the annual accountings by the trustee. The complaint then recites the death of the *cestui que trust*, leaving the plaintiff, his widow, him surviving; and that the said *cestui* left a last will and testament, which "*was duly admitted to probate by the Surrogate's Court of Herkimer County;*" the further allegation: "*that in and by the terms of the said will of Fred G. Nelson, deceased, defendant, Bertha J. Eysaman, then Bertha J. Nelson, received and became entitled to and seized of all property, real and personal, of the said Fred G. Nelson, deceased;*" that plaintiff was named and duly qualified as executrix of her deceased husband's will; and that the trust in the George Nelson will terminated with the demise of Fred G. Nelson.

All of the above described allegations were unquestionably truthful and were quite appropriate to the action by the trustee to account for his acts.

But the complaint does not stop there, but continues with a most remarkable allegation, and so utterly foreign to the scope of an action to account as to at once arouse suspicion that there was some ulterior purpose for its interpolation, and explains why the Nelson heirs are joined with the plaintiff as parties defendant. The allegation is as follows: "Upon information and belief the plaintiff further alleges, that the defendants, Walter Nelson, Kate Pearce, Ida W. Fenner, Elva W. Pomeroy and Jeanette Willoughby, constitute and are all of the heirs at law and next of kin of the said George Nelson, deceased, and *as such became seized of and owners of all the real estate and personal property constituting the trust estate* and left by said George Nelson and existing at the time of the death of Fred G. Nelson aforesaid;" that the defendant Walter Nelson was entitled to one-half of said estate, and that the nieces were each entitled to receive one-eighth of said estate. Having included such allegations in the complaint, how absurd becomes the present position of the trustee's attorney that he then knew that such allegations were false and that the plaintiff was the owner and entitled to the entire trust estate. On being pressed to explain the discrepancy between what he had his client swear to, and which as attorney he himself had signed, and that which he on the trial insisted he knew, Livingstone makes the lame excuse that the complaint was Eaton's and that he drew it so as to conform to his client's notion rather than his own knowledge—a most extraordinary position for a lawyer to take. If anything was required to show that Livingstone was innocent of any knowledge of his client's legal right to the trust estate, or knowing that the property belonged to her, became a party to a conspiracy to deprive her of it, it is furnished by these allegations of his complaint.

But that it was not a mere accident that the Nelson heirs were joined with plaintiff as parties defendant in this "action for a final accounting" by the trustee, and that there was a real reason for the bringing of this action so close upon the heels of the Mills-Livingstone settlement, and indeed before it was consummated by the passing of the deeds, becomes apparent as the succeeding allegations of the complaint unfold themselves. The complaint continues with allegations: That on or about March 2, 1906, the widow of Fred G. Nelson, "the sole and only legatee and devisee" under his will, duly sold and transferred to the defendant Nelson heirs, the Nelson home farm of 326 acres and the Danube farm of 219½ acres; that such conveyances were upon good consideration and that thereby the grantees became seized of said two farms; that on said March 2, 1906, the Nelson heirs conveyed to the plaintiff, Bertha J. Eysaman, the undivided one-half of the Churchill farm, and that she was then seized thereof. As a matter of fact such conveyances could not have been made at the time said complaint was verified, although the deeds were dated on March 2, 1906, because the authentication of the last mentioned deed and the mortgage given concurrently by the Nelson heirs was not completed until April 25, 1906. So that the decree which was granted April 6, 1906, in the action ratified conveyances that had not been made.

The complaint further alleges the purchase by the Nelson heirs of the stock on the Home and Danube farms from plaintiff for \$3,200, and the payment therefor with trust funds.

The complaint closes with a prayer that the trustee's accounts be judicially settled and allowed as therein stated and that all his proceedings as shown in said complaint be passed upon and approved by the court; that he be allowed commissions and expenses, and that he and his bondsmen be discharged from further liability or responsibility, and for such other or

further or different relief as to the court may seem just and equitable, "besides an allowance for the costs and expenses of this action." While this prayer does not specifically ask for the ratification of the "settlement" effected by Mills and Livingstone, a cursory perusal of the complaint reveals that the concealed purpose of the action was to clinch by a decree of the Supreme Court a transaction whereby an ignorant and confiding woman was being relieved of a valuable estate without consideration.

The complaint was verified by Eaton, the trustee, on April 3, 1906. Livingstone testifies that he personally served the summons and a copy of said complaint upon the plaintiff, Bertha J. Eysaman, in Little Falls (at what place it does not appear), on the day of its verification or the day after, and explained to her what it was, and that she should take it to her attorney. Mrs. Eysaman denies that she was served or informed as to the contents of the complaint. Strangely, no proof of service was filed. Shall testifies that she brought the summons and complaint to him and that he had it two days in his possession to examine and prepare her answer. In this Shall is clearly mistaken, as the answer which he prepared was verified on the fourth day of April, 1906—the very day when Livingstone says he may have served plaintiff. The summons and complaint which it is claimed was served upon Mrs. Eysaman was not produced upon the trial, Shall disclaiming any knowledge of the whereabouts of the document. The plaintiff denies the service and disclaims any knowledge that an action was pending to adjudicate as to the title or disposition of the trust estate. She asserts that Livingstone informed her of the necessity of an accounting in court by the trustee, and that he could not represent her, but that Shall, who had a communicating office with him, could do so; and that she was then led to sign a paper which was not read to her, but which she under-

stood related to Eaton's accounting, with which she had been led to believe she had no concern. Shall never presented to his client any bill, nor did she pay him anything for his services. He never consulted with his client as to her rights, and took no steps to investigate the same. His allowance of fifty dollars, made in the decree, was paid by the Nelson heirs. The fact that her written retainer of Shall as her attorney authorized him to appear for her only in proceedings by Eaton to account and the other attendant circumstances amply corroborate plaintiff's version.

As a pleading, the answer which Shall says he prepared, and which bore unmistakable evidence of having been typewritten on the same machine as the complaint, is certainly *sui generis*. It admits each allegation of the complaint; then alleges that Eaton is trustee and has executed the trust as alleged in the complaint; that he has received and paid out the amounts set forth in the accounts contained therein, and on information and belief that the account as presented by the trustee is correct and should be allowed; and prays that the plaintiff have the relief prayed for by him in the complaint. The "Answer" contains nothing more. No such pleading as this is authorized by law or practice. Section 500 of the Code of Civil Procedure provides what an answer shall contain.

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

The "Answer" served in behalf of Mrs. Eysaman surely had no warrant in law. Why was such an answer interposed? Manifestly with a design to show that she knew the contents of the complaint and to estop her from afterward questioning the

truth of its allegations concerning the disposition of the Nelson trust estate. It is quite possible that Shall, at the time, may have been innocent of knowingly attempting to overreach plaintiff, but he certainly permitted himself to be used for such purpose.

Livingstone testifies that he served the summons and complaint upon the defendant Walter Nelson in the city of Utica. Senator Mills testified that he guessed it was early in March that he was aware of the trustee's action; that he thought Mr. Walter Nelson brought him a copy of the summons and complaint; "that it had been mentioned that they would have an action to settle Mr. Eaton's accounts."

On April 5, 1906, two days after Eaton verified his complaint, Mills appeared in the action for the defendants Walter Nelson and the four nieces, and himself verified and served an answer in behalf of his clients. The answer, verified by Senator Mills before Livingstone as county judge, is significant.

It also admits the allegations of the complaint, and then discloses its underlying purpose to confirm the "settlement" whereby plaintiff had been relieved of her property and to obtain a decree of the Supreme Court which would effectually prevent plaintiff from ever thereafter attacking the same. The answer alleges that there was a dispute between the Nelson heirs and Mrs. Eysaman as to the ownership of the stock on the farms after Fred's death, and that each side was claiming the same. How this could be when Eaton years before had bought this stock of Fred and covenanted to return the same to his personal representative, and how the Nelsons could be then doubting Mrs. Eysaman's title thereto when they had paid her \$3,200 the fall previous for this same stock, is hard to understand. The answer also somewhat hazily alleged that there was some dispute as to the ownership of the real estate; thus very adroitly putting forth the idea that there were disputed

claims between the parties, and that the settlement effected was a good and sufficient consideration for the conveyance by Mrs. Eysaman to the clients of Senator Mills. The details of the alleged compromise and settlement are set forth at length, and, in the prayer for relief, judgment is demanded ratifying, confirming and adjudging to be valid, lawful and binding upon each and every of the parties the "aforesaid settlement and compromise between these defendants and the said Bertha J. Eysaman, and all the conveyances, transfers and payments made in pursuance thereof and in consummation thereof." The prayer further demands that the parties to such compromise be adjudged to be the owners of the property going to each thereunder. Thus it will be seen that from a simple, uncontested action by a trustee to account was evolved an action to ratify and confirm a most unconscionable transaction.

The Mills answer was served on the day of its verification, April 5, 1906, on the plaintiff's attorney, and a copy thereof served on attorney Shall claiming to represent Mrs. Eysaman. Then on the day following, April 6, 1906, with the utmost diligence—all hands—Eaton, the trustee, and Livingstone, his counsel, Senator Mills, representing the Nelson heirs, and attorney Shall, appearing for Mrs. Eysaman, betake themselves into the presence of the Supreme Court there to obtain adjudication of the "issues" in the action. Eaton and Walter Nelson are briefly sworn, but not cross-examined. A previously prepared decision and final decree are presented to and signed by Mr. Justice Scripture. The decree allows and passes the plaintiff's accounts, and approves of his various acts as trustee, and then proceeds to accomplish the evident purpose of the action by ratifying, confirming and adjudging to be lawful, valid and binding upon the parties the "said settlement, compromise and agreement," and confirming the conveyances alleged to have been made in accordance therewith, but which in

fact had not yet been made, for the reason that they had not been delivered. Said final judgment further decrees the title and ownership of the Homestead and Danube farms and all the trust estate, save the half interest in the Churchill farm, to be in the Nelson heirs, and that of the Churchill farm to be in Mrs. Eysaman.

The decree directs the trustee to pay from out of the balance of moneys in his hands the following allowances: To Robert F. Livingstone, his attorney, \$500; to A. M. Mills, attorney for defendants Nelson et al., \$750; and to Frank Shall, attorney for defendant Bertha J. Eysaman, \$50.

These allowances are followed, not without significance, with the adjudication: "That the said Fred G. Nelson, *cestui que trust*, having died, the said trust is at an end."

The trustee is allowed commissions to the amount of \$607.54 and "for expenses incurred by him on this accounting and otherwise," payable from the trust funds in said trustee's hands after the payment of allowances to the attorneys, and, if sufficient moneys did not remain after payment of said allowances to attorneys, it was decreed that Eaton, the trustee, should have a lien upon the real estate adjudicated to the Nelson heirs, and the income to be derived therefrom in the immediate future, and authority given him to retain possession of said real estate and receive the future income therefrom until paid the full amount of said commission and compensation.

The absurdity of such a provision is rivalled only by the amount of the allowances made to attorneys for services rendered during a period of not to exceed two or three days, and involving no contest.

I have endeavored to relate somewhat in detail the circumstances surrounding this controversy. Therefrom it is apparent that there was concerted action on the part of the Nelson heirs, aided by able counsel and by the trustee, Eaton, to with-

hold from plaintiff property to which she was justly entitled; that plaintiff was in entire ignorance of her rights and so remained until shortly before the commencement of this action; that either Livingstone was unaware of his client's rights in the premises and became a most passive tool in the hands of others better informed, or he was a party to a deliberate scheme to defraud his client. It must be conceded that his conduct in relation to the action of Eaton to account and the manifest intention through the instrumentality of such action to forever foreclose an ignorant and confiding woman from asserting her rights should some future day discover them to her, is hardly reconcilable with the theory of ignorance. The preconceived purpose of that action is all too apparent.

In my opinion, the bringing of this action, the interpolation of matter so foreign to the accounting of the trustee, the concert of action of the parties engaged in carrying on the action and its consummation in the decree, furnish the strongest kind of evidence of the conspiracy to deprive this unfortunate woman of her property. If the settlement was honest and the deed obtained from plaintiff a valid one, untainted by fraud, why was such a decree necessary? If the transaction was clean and above board, no Supreme Court decree was required to confirm it. The deal was a questionable one, and the perpetrators believed it needed fortifying, and, in their efforts to clinch the affair, they overreached and branded the whole transaction as a fraud.

The motives which actuated the Nelson heirs are easy to understand. It was not strange that they entertained a prejudice against the daughter-in-law of their kinsman, who bore no blood relationship to the deceased nor to them. They undoubtedly considered her an interloper, who had no claim, except as the widow of a dissolute son of their kinsman, from whom indeed she had separated before his death, and he having died

without leaving a child, the blood relatives of George Nelson undoubtedly looked with jealousy upon a stranger inheriting this valuable estate, in the accumulation of which she had had no hand. But the prejudices of these so-called "heirs" should not be permitted to deprive the plaintiff of that which the law clearly gives her. And if it appears that those who have no legal right to this property have acquired it by means of a fraud perpetrated upon the rightful owner, equity should reach out and take from the wrongdoers the fruits of their dishonest acts and restore them to the person entitled thereto.

In any event, the plaintiff was induced to enter into a most unconscionable bargain. In ignorance of her rights she was led to part with a valuable estate without a particle of actual consideration.

There are certain facts over which there can reasonably be no controversy.

First. The plaintiff owned and was entitled to receive the entire remainder of the trust estate upon the death of her husband. This property became hers absolutely, subject only to an accounting by the trustee for his acts.

Second. Plaintiff was entirely unaware of her rights and continued in such ignorance until long after she had been led into signing away her title thereto.

Third. Plaintiff, while uninformed of her legal rights, through a fraud practiced upon her, was induced to sign away the same, and in her ignorance and believing that her counsel was guarding her interests, was lulled into allowing a decree of the Supreme Court to be taken which was a part of the fraudulent scheme, and by which the parties thereto sought to bind the plaintiff and to fortify their fraudulent acts.

Fourth. This property, aggregating about \$40,000, was taken from plaintiff without the shadow of a consideration at the time.

The only possible excuse for consideration now offered by the heirs is that the adjustment and the division were in settlement and compromise of a disputed claim. But no such dispute ever existed. Plaintiff was ignorant that she had any claim. Livingstone, whether ignorant or not, was urging no such claim. The defendant heirs now for the first suggest that the will of Fred G. Nelson, plaintiff's husband, was open to attack, and that, with that will out of the way, the Nelson heirs would on Fred's death intestate inherit the trust estate as his heirs at law. That no such claim was made by them or suggested at the time appears beyond question from the evidence. Such claims as they were making at the time, while not made in good faith, were made on the theory *that they were the heirs at law of George Nelson*, and not of Fred G. Nelson. Nowhere can be found a suggestion of any claim through Fred, except the intimation claimed to have been made by their attorney that there might be a question as to Fred's will. But this suggestion seems too evidently to be an afterthought. The evidence of the absence of any such claim being made at the time is altogether too overwhelming to entitle it to serious consideration. Quite in conflict with such position are the following circumstances:

First. The will of Fred was admitted to probate without contest. The heirs must have been parties to that proceeding.

Second. In the fall of 1905, the Nelson heirs purchased \$3,200 worth of stock of plaintiff, as executrix of her husband's estate, and whose only title thereto came through Fred's will. They then made no question as to the validity of the will.

Third. In the Eaton complaint it is alleged that the Fred G. Nelson will was duly admitted to probate, and that thereby plaintiff as devisee became seized of the undivided half of the Churchill farm which her husband had inherited from his mother.

Fourth. Senator Mills' answer in behalf of the Nelson heirs admits said allegations of the trustee's complaint.

Fifth. In said answer of the Nelson heirs, we find the following positive allegation: "*The said Bertha J. Eysaman owned the other undivided one-half of the said Churchill farm in her own right.*" How did she own it? *Only through her husband's will.*

Sixth. The decision and decree in the trustee's final action to account, in which all concurred, specifically sets forth the nature of the dispute, as relating to the trust estate under the George Nelson will and not including the undivided half of the Churchill farm which never was part of said trust estate, but which came to plaintiff by her husband's will.

Seventh. On the "trial" before Justice Scripture, Walter Nelson testified that the dispute between the Nelson heirs, of which he was one, and Mrs. Eysaman was with reference to the trust property, they claiming it *as heirs of George Nelson*, whereas the widow claimed through Fred. And Walter Nelson, in response to a direct question by his counsel, Senator Mills, testified unequivocally that "*Bertha Nelson owned one-half of the Churchill farm in her own right.*" This was in reference to the "dispute" as it was then being exploited. The defendants here are bound by that decree. They are not attacking it and are seeking to avail themselves of its provisions.

Eighth. Nowhere in the pleadings, papers, proceedings, decision or decree in the Eaton action to account can there be found the suggestion of any dispute founded upon the invalidity of Fred's will.

Ninth. Fred's will was executed October 8, 1900, nearly five years before his death. It was witnessed by Eaton himself, and the disposition thereby made of his property was entirely reasonable. He was childless, and both his parents were dead. His only relatives were an uncle and cousins widely scattered, one

residing in California. What more reasonable disposition of his property could he make than to his wife under such circumstances?

It is evident that the claim that the validity of Fred G. Nelson's will was a factor in their settlement is a desperate afterthought. No such claim was asserted. The "claim" which the defendants, Walter Nelson and the nieces, did make that they took the trust estate as heirs of George Nelson, was, as I have already suggested, perfunctory only. They and their counsel knew at the time of the alleged compromise that they had no such claim. It was judiciously advanced with a view of obtaining the property. It had no substance. It is practically conceded that the Nelson heirs had absolutely no right to any part of the trust estate; that on Fred's death it became a part of his estate and passed under his will to plaintiff. Not having even a colorable right to the trust estate, their claims were without substance. Undoubtedly forbearance to assert either a legal or equitable claim will constitute a sufficient consideration. A compromise of a disputed claim may form a sufficient consideration. But there must at least be a colorable claim. The matters in issue between the rival claimants must be in some doubt. It is not necessary that the party claiming to have been injured by the compromise should have a right to hold. It is sufficient if it is doubtful—"colorable." But here there was never any claim made in good faith. It was not colorable. Mr. Justice Jenks, in an able opinion, in *Springstead v. Nees*, 125 App. Div. 230, 232, thus states the rule: "But if the claim be not even doubtful or colorable or plausible in that there is no reason for an honest belief that it has some foundation in law or equity, then forbearance applied to it is not good consideration."

Parsons, in his work on Contracts (Vol. 1, 5th ed. 440), states the rule limiting the extent to which the compromise of a

disputed claim is effective as a consideration, as follows: "An agreement to forbear for a time, proceedings at law or in equity, to enforce *a well founded claim*, is a valid consideration for a promise. But this consideration fails if it be shown that the claim is wholly and certainly unsustainable at law or in equity."

Wharton on Contracts (§ 532) says: "The fact that the suit is not well founded makes no difference if it has a show of title; *though it is otherwise in cases of fraud, and in cases where the claim to be forborne is utterly destitute of support.*" Also see *Sherman v. Barnard*, 19 Barb. 291, 302.

In the case at bar there was not even a colorable claim, and it was not made in good faith, but in an effort to overreach the absolute owner of the property. And again there was no dispute. Plaintiff was in ignorance of her rights. Her counsel, unless a party to the fraud, was no better informed than his client. That he could have made claim that plaintiff was entitled to the trust estate is not supported by the weight of evidence. There being no dispute, there was no compromise. *Dolcher v. Fry*, 37 Barb. 152, 155, 156, 157; *Russell v. Cook*, 3 Hill, 504.

To make the settlement of a disputed claim a sufficient consideration the transaction must be clean and without suggestion of fraud. As said by Chief Judge Follett in *Wahl v. Barnum*, 116 N. Y. 87, 95: "*In the absence of fraud or duress, a settlement of a disputed claim preferred in good faith by a promisee against a promisor, is a legal consideration for a promise.*" Also see *Stewart v. Ahrenfeldt*, 4 Den. 189; *Feeter v. Weber*, 78 N. Y. 334, 337.

The contention that the waiver of the Nelson heirs of their right then open to them to move in Surrogate's Court for a revocation of the probate of the Fred G. Nelson will, under sections 2647 and 2648 of the Code then in effect, formed a good consideration for plaintiff's deed is clearly an afterthought.

Such a thing was not seriously considered by the parties. They had by their acts ratified the will. Months before they had taken from plaintiff, as executrix, \$3,200 worth of personal property, and plaintiff's only right to sell the same was through said will. By so doing and their admissions and allegations in relation to said will in the Eaton action they would seem to have been estopped from questioning its validity or the probate thereof. As was said by Parker, J., in *Matter of Peaslee*, 73 Hun, 113, 115: "*he who receives money or property, or a benefit of any kind under an instrument, whatever its character, or his relation to the maker of it, cannot question the instrument in whole or in part.*"

If their acts do not estop them, they surely conclusively show that any such procedure was not thought of at the time.

Not only was the Eaton judgment obtained by fraud, and indeed was part and parcel of the scheme to deprive plaintiff of her own, but, so far as affecting plaintiff's property rights is concerned, should be held to be ineffective. Plaintiff swears she was never served with the summons and complaint. In so testifying she contradicts Livingstone, who says he served her on the day the complaint was verified, April 3, 1906, or the day after, the fourth of April, but who never filed an affidavit of such service, and also contradicts Shall, who says she handed the paper to him and he held it for two days and then prepared her answer. Shall is certainly mistaken, as the answer was verified on April fourth. Plaintiff's version is the more probable. She says she was given to understand that the paper which she was led to sign related to the Eaton accounting, and that she received no intimation that it affected the title to the trust estate. She signed the paper under the very natural impression that it related alone to the matter in which she had expressly retained Shall as her attorney, to wit: the trustee's accounting. Livingstone was really her attorney, although at

his suggestion she temporarily retained Shall to represent her on the trustee's accounting. For all other purposes Livingstone was still her attorney. Her accounting as executrix under her husband's will was yet to be had. The "settlement" wherein Livingstone assumed to represent her was long after she had retained Shall to act for her on the accounting. Indeed the relations of attorney and client between Livingstone and plaintiff must have continued until he received his \$3,500 as his share of what plaintiff received, and which could not have been before sometime in May, 1906, as the authentication as to the execution thereof by one of the mortgagors was not completed until April 25, 1906, by certificate that day made by the county clerk of Yolo county, in the state of California.

As before suggested, the allegations in the Eaton complaint concerning the alleged dispute and affecting the disposition of the trust estate were foreign to the scope of the action and foreign to what plaintiff had been led to believe was its purpose. The prayer for relief in the Eaton complaint is merely for an accounting and nowhere asks that adjudication be made as to the disposition of the trust estate. The answer served on behalf of the Nelson heirs sought to lay the basis for such an adjudication, but plaintiff was not advised thereof. The adjudication obtained was as to no matter at issue under the complaint. It purports to determine issues between the Nelson heirs and a co-defendant—this plaintiff. Cross answers are claimed to have been served by Senator Mills, representing the Nelson heirs, and Shall, representing Mrs. Eysaman. Section 521 of the Code of Civil Procedure prescribes the practice in cases where the judgment may determine the ultimate rights of two or more defendants as between themselves, and provides that a defendant requiring such determination must *at least twenty days before the trial* serve a copy of his answer demanding such determination upon the attorney for each of the de-

defendants affected thereby. The answer in this case must have been served, if at all, on the day of the trial, or possibly the day previous. But a more serious criticism to the attempted adjudication in this case is that it does not relate to a matter pertinent to the allegations of the complaint—to plaintiff's legitimate cause of action. The law is well settled in this state that independent demands between co-defendants cannot be litigated in an action, where such demands are foreign to the cause of action set up in the complaint. *Kay v. Whittaker*, 44 N. Y. 565; *Binghamton Savings Bank v. Binghamton Trust Co.*, 85 Hun, 75; *Van Allen v. Rogers*, 5 Misc. Rep. 420; *Lansing v. Hadsall*, 26 Hun, 619; *Jones v. Grant*, 10 Paige, 348; *Elliott v. Pell*, 1 id. 268; *New York Life Ins. & Trust Co. v. Cuthbert*, 87 Hun, 339.

All that Eaton asked in his complaint was the settlement of his accounts as trustee.

The decree in the Eaton action, so far as it relates to the trust estate and purports to adjudicate title thereto, is no bar to the claims of plaintiff in this action. *House v. Lockwood*, 137 N. Y. 259; *Reynolds v. Aetna Life Ins. Co.*, 160 id. 635.

Disregarding the fraud that was perpetrated upon Mrs. Eysaman, the Eaton action and decree were final only as to the issues presented by the complaint.

But the judgment was fraudulent and the decree fraudulently obtained and should be set aside. *Dodson v. Pearce*, 12 N. Y. 156; *Rice v. Bruff*, 87 Hun, 515; *Vilas v. Plattsburg & M. R. Co.*, 123 N. Y. 440; *Kinnier v. Kinnier*, 45 id. 535, 542; *Davis v. Cornue*, 151 id. 172.

As said by Judge Folger in *Mandeville v. Reynolds*, 68 N. Y. 528, 543: "Judgment obtained by fraud upon a court, binds not such court or any other, and its nullity upon that ground though it has not been set aside or reversed, may be alleged in a collateral proceeding."

The fraud in obtaining the decree was not only upon the plaintiff, but upon the court itself. When appearances indicate that all parties to an action are represented, some excuse is furnished for relaxation of vigilance by the court and for granting a decree for which all counsel unite in asking.

So far as the defendant Livingstone is concerned, he has clearly obtained from plaintiff \$3,500 to which he was not entitled. If he failed to understand plaintiff's rights, then he was guilty of gross negligence, and is entitled to no compensation. If, on the other hand, he fully understood his client's legal rights, he knew she was giving away the vast bulk of her estate, to which sacrifice he was consenting, and in the furtherance of which he was actively engaged. If he knew the trust estate, amounting to substantially \$50,000, as a matter of right, belonged to his client, as he now says, then he entered into a most unconscionable contract whereby he was to receive one-half thereof, or \$25,000 for getting what she owned. He must have known if the property belonged to his client that all that was necessary on her part was to take possession thereof. Courts are prone to scrutinize with great care contracts between attorneys and their clients. All such transactions are regarded with the greatest jealousy. "The clearest evidence is required, that there was no fraud, influence or mistake—that the transaction was perfectly understood by the weaker party." *Nesbit v. Lockman*, 34 N. Y. 167.

The facts did not justify Livingstone in taking the \$3,500 from his client. Such amount is out of all proportion to the service rendered. *Turnbull v. Banks*, 22 App. Div. 508; *Matter of Holland*, 110 id. 799.

The courts have even proceeded to the extreme of holding that the presumption is against the propriety of such a transaction. *Nesbit v. Lehman*, *supra*, 169; *Hitchings v. Van Brunt*, 38 N. Y. 336; *Matter of Fitzsimons*, 77 App. Div. 345.

The defendant Livingstone should restore to plaintiff the \$3,500 which he took from her, with interest. Nor does the fact that plaintiff assigned the mortgage for that amount to Livingstone's wife relieve him from liability to make restoration to plaintiff. *Matter of Demarest*, 11 App. Div. 156; *Reigal v. Wood*, 1 Johns. Ch. 402.

The circumstances in this case further demand that the defendants Walter Nelson, Kate Pearce, Ida W. Fenner, Elva W. Pomeroy and Jeanette Willoughby at once restore to the plaintiff the property thus wrongfully and without consideration obtained, and the deed given by plaintiff be set aside, and they should be required to account to plaintiff for the use and income therefrom for the period during which they have held it. They were never legally entitled to any part of the property in question, and, therefore, are not injured by returning it to the person rightfully entitled thereto. Proper provision should, of course, be made for the protection of innocent parties who have advanced money on the strength of the mortgage given by the Nelson heirs to plaintiff.

While the determination of this case necessarily involves unpleasant features, yet it seems to me that any other result than that indicated would be a gross perversion of justice, and a great wrong would stand uncorrected.

Ordered accordingly.

WILLIAM GABRIEL, Plaintiff, v. BARBARA GABRIEL et al.,
Defendants.

(Supreme Court, Kings Special Term, February, 1913.)

WILLS—DECLARATION OF TRUST—REAL PROPERTY LAW, § 242—PLEADING
FORMER DECREE.

FRAUD—PRESUMPTION OF—CANCELLATION OF DEED ON GROUND OF—STAT-
UTE OF LIMITATIONS—CODE CIV. PRO., § 396.

Where the will of testatrix recited that whereas it was the intention of her deceased husband, by whose will she inherited all her estate, that upon her decease the "residue and remainder" of his estate should go to his children, and that she so desired it, there is no declaration of trust of the property received by her from him, within the meaning of section 242 of the Real Property Law, as the will failed to show that she took the property under any promise express or implied to carry out his intention, but that in giving it to the children she was carrying out his wishes.

Unless pleaded, a former decree between the same parties involving the same subject-matter is not conclusive, but the findings of fact even though the decree be not pleaded are presumptive evidence, at least, in any subsequent litigation between the same parties where the same facts are in issue.

Where a conveyance from a mother to two of her children was drawn up by a reputable attorney, the fact that the grantor was aged does not justify the cancellation of the deed on the ground of fraud.

Any presumption of fraud arising from such a conveyance is greatly weakened when twenty-two years have elapsed before it is attacked in court.

Where, in an action commenced in 1900 to set aside such conveyance for fraud, it appears that defendants, who were executors of their mother's will as well as her grantees under such conveyance, were in 1893 charged with fraud in accounting proceedings before the surrogate, the plaintiff, a grandson of the grantor, who was then twenty years of age, if he knew the facts constituting the fraud regarding the conveyance, would have had, under section 382(5) of the Code of Civil Procedure, six years from 1893 in which to bring the action, and, as his time would not have

been extended by section 396 of said Code, the action is barred by the Statute of Limitations, and defendants are entitled to judgment.

ACTION for the construction of a will.

O'Neil & O'Neil, for plaintiff.

J. Stewart Ross and Nicholas Deitz, for defendants.

CRANE, J.—Catherine Gabriel died on the sixteenth day of December, 1891, at the age of seventy-four years, leaving the parties to this action, or their parents, as her surviving heirs and next of kin. She had received certain real and personal property from her husband, who had died the previous year, and on the seventh day of August, 1890, made a will to carry out, as she therein stated, the wishes of her husband to have the remainder of the property go to the children. After the making of this will, and in October of 1890, Catherine Gabriel made a deed of the real property here in litigation to two of her children, Joseph Gabriel and Elizabeth Fritz, to the exclusion of the other children, and in April of 1891 executed to the same parties another deed covering the same premises and for the purpose of making certain corrections therein.

Joseph Gabriel and Elizabeth Fritz were made executors of their mother's will, and in 1893 filed their accounts as such, to which objections were made. The matter was referred to Charles H. Otis, as referee, who thereafter reported surcharging these two executors with many thousands of dollars, and making findings of fact regarding the physical condition of Catherine Gabriel in 1890 and 1891, and the confidential relationship which existed between her and her two children, Joseph Gabriel and Elizabeth Fritz. This report was confirmed by the surrogate and on appeal.

The plaintiff in this case, William Gabriel, was a grandson of the deceased and a party to the accounting proceedings, and in 1893 was twenty years of age.

In 1900, about nine years after the making of the deeds above mentioned, William Gabriel commenced this action to set aside those deeds on the ground of fraud. Not until December of 1912, or about thirteen years thereafter, has this action been brought to trial.

In his first cause of action the plaintiff claims that Catherine Gabriel received the property in question from her husband in trust for her children, and that her will of August, 1890, is the writing required by the statute (Real Prop. Law, § 242) as evidence thereof. The only suggestion of any trust is to be found in the recitals in this will which read as follows:

"WHEREAS, all the estate, real and personal, of which I may die seized or possessed or to which I may be entitled at the time of my decease came to me by virtue of the last will and testament of my deceased husband, Jacob Gabriel, and

"WHEREAS, it was the intention of my said husband that upon my decease the residue and remainder of his estate should be equally divided and distributed among his children, and that each of his children to whom he had made advances during his lifetime should be charged with the amount of such advances, and

"WHEREAS, I desire to carry out, as nearly as possible, the wishes of my said husband, I do therefore make disposition of my estate as follows: "

It will be noticed that the testatrix does not say that it was the intention of her husband that his estate upon her decease should go to his children, but that the "residue and remainder" should thus be disposed of. This gave the wife the right of disposal in her lifetime. But even then, while there may be some evidence of Joseph Gabriel's intention, there is no evi-

dence that Catherine Gabriel took the bequests and legacies under any promise, express or implied, to carry out such an intention. It is quite evident that all the testatrix has stated by the above recitals is that in giving the property to her children she was carrying out the wishes of her husband. No trust was either created or evidenced by the language used. *Amherst College v. Ritch*, 151 N. Y. 282, 323; *Miller v. Hill*, 64 Misc. Rep. 199, 204.

The next cause of action pressed upon the court for consideration is the claim that Joseph Gabriel and Elizabeth Fritz obtained the deed of October 29, 1890, from Catherine Gabriel through fraud and undue influence. There is no claim of actual fraud but it is asserted that these two grantees held such a confidential relationship with the deceased that, considering her age and infirm physical and mental condition, there was constructive fraud, *i. e.*, the burden was cast upon these two defendants to show that the transaction was fair, just and understood.

The plaintiff attempts to prove this constructive fraud by the report of the referee in the Surrogate's Court upon the accounting above referred to in which it is stated that Catherine Gabriel died on the sixteenth day of December, 1891, at the age of seventy-four years; that for upward of a year prior to her death she had suffered from diabetes from which disease she ultimately died, and for several months prior to her death she was confined to her house, and for a number of weeks to her bed and unable to move or feed herself without assistance; that during this time she could see but poorly and in the latter stages of her illness was almost blind; and that Elizabeth Fritz and Joseph Gabriel were in constant attendance upon her and had charge of all business matters in which she was interested.

These findings of the referee, approved by the decree of the surrogate, were binding upon all the parties to the litigation if

they were necessary to the determination. The reading of the record in the Surrogate's Court convinces me that such findings were a part of the issues litigated before the referee and necessary for part of his conclusions, and would, therefore, be presumptive evidence, at least, in any subsequent litigation between the same parties where the same facts were in issue.

The surrogate's decree would not be conclusive upon this court as it has not been pleaded. *Krekeler v. Ritter*, 62 N. Y. 372. Whether or not it would have been conclusive if pleaded, in view of such authorities as *Baxter v. Baxter*, 76 Hun, 98, and *Kirk v. McCann*, 117 App. Div. 56, I need not now determine, but I do consider it competent evidence bearing upon the issue, provided the facts in dispute were the same. The findings of the referee, however, do not cover or refer to the time in question. The deed was made October 29, 1890, while the findings of the referee in their widest scope cover only one year prior to December 16, 1891. No presumptive evidence, therefore, arises from these findings that in October of 1890 the deceased was incapable of making a deed or so infirm as not to understand the transaction. Therefore, leaving out of the case all the findings of the referee, only the relationship of the two grantees and their apparent intimacy with their mother remains and this is not sufficient to justify the cancellation of the conveyance in view of the fact that the deed was drawn up in the well-known law office of S. M. & D. E. Meeker, and signed and executed by Catherine Gabriel in the presence of S. M. Meeker, Jr., and acknowledged before him on the 26th day of November, 1890.

Whatever presumption of a fraud may arise from the conveyance of property to a person standing in close and confidential relationship must of necessity be greatly weakened when twenty-two years have elapsed before the deed is attacked in court.

I, therefore, determine that upon this cause of action the plaintiff has failed to make out a case.

However, even if the plaintiff had established his third cause of action and I was justified in setting aside this deed as procured by fraud, the Statute of Limitations would bar such relief. By subdivision 5 of section 382 of the Code of Civil Procedure, the plaintiff has six years after the discovery of the fraud in which to bring action to set aside a deed. In 1893 when Joseph Gabriel and Elizabeth Fritz were charged with fraud in the accounting proceedings before the surrogate the plaintiff was twenty years of age, and, if at that time he knew the facts constituting the fraud regarding the conveyance of this real property, he would have had six years from 1893 within which to maintain this action. His time would not have been extended by section 396 of the Code of Civil Procedure. *Hyland v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 417; *Matter of Rogers*, 153 N. Y. 116; *Jauga v. Goetz*, 11 Misc. Rep. 380.

The facts essential to maintain this action I find were known to the plaintiff in 1893 as shown by his testimony and the reasonable inferences to be drawn therefrom. He must have known that his grandmother was an old lady, that Joseph Gabriel and Elizabeth Fritz were her children, that they had obtained from her the deed in question, and that there was a question raised as to its validity. This knowledge was sufficient to set the statute running so that in 1900, when this action was commenced, the time in which to bring it had expired. Judgment will be rendered for the defendants.

Judgment for defendants.

GEORGE PRATT INGERSOLL, as Executor of and Under the Last Will and Testament of MARY E. INGERSOLL, Deceased, Plaintiff, v. THERESA VAN DEN H. INGERSOLL et al., Defendants.

(Supreme Court, Greene Special Term, April, 1913.)

WILLS—DIVISION OF REST, RESIDUE AND REMAINDER INTO CERTAIN PARTS
—ACTION FOR CONSTRUCTION OF RESIDUARY CLAUSE AS TO DIVISION.

Testatrix, nearly five years prior to her death, made a will by which she gave to eighteen legatees, two of whom died before her, general legacies aggregating \$22,500, and devised a house and lot to her brother for life, with remainder to a nephew and two nieces, and after certain specific bequests the executor was directed to divide all the rest, residue and remainder of the estate into three parts, one of which was given to the children of another brother of testatrix, one to the children of the life tenant of the house and lot, and one to the children of her deceased sister and their heirs forever, *per stirpes*, with provision that in case of the death of any of said children before the testatrix leaving issue they should take the share of his or her deceased parent *per stirpes*. At the death of testatrix, there was cash available to pay only about forty per cent. of the unlapsed legacies, and, in addition to the real property devised, testatrix had no real estate other than an undivided one-third interest, of the value of \$1,000, in a homestead. In an action brought by the life tenant of the house and lot for a construction of the will, to which all the devisees named in the residuary clause were made parties, *held*, that said clause which was sufficiently comprehensive to cover both real and personal property was convincing evidence that testatrix supposed when she made her will that she would have a residue of personal property to be disposed of after the payment of her general legacies, and that the evidence was insufficient to show that she intended to charge her real estate with their payment.

The direction in the residuary clause to divide, followed by a devise and bequest of one of said parts to the children of each of her two brothers and of her deceased sister, cannot be fairly construed as a power of sale in the executor to divide the residue into three parts, and, therefore, the rule that where there is no direct gift except that contained in a direction to pay or divide in the

future did not apply, and that the interest of testatrix in the homestead vested in the three classes of nephews and nieces without any aid, or need of aid, on the part of the executor in making a division.

ACTION to construe a will.

Theodore F. Humphrey, for plaintiff.

Thomas Hun, guardian *ad litem* and attorney in person, for infant defendants.

CHESTER, J.—Under the will of Mary E. Ingersoll, the construction of which is sought in this action, the testatrix gave to eighteen legatees general legacies aggregating \$22,550. Two of these legatees, having legacies amounting to \$300, died before the testatrix so that their legacies lapsed, which left \$22,250 of unexpired money legacies given by the will. In her will the testatrix devised a house and lot in New Haven to her brother, who is the plaintiff, for life, with remainder to a nephew and two nieces. She also gave numerous specific bequests of jewelry, silverware, china and other personal effects. The will then contained the following residuary clause:

“*Thirty-eighth.* All the rest, residue and remainder of my property of every nature and description and wheresoever located, I direct my executor to divide into three parts. I give, devise and bequeath one of said parts to the children of my brother C. Macrae Ingersoll, the second of said parts to the children of my brother George Pratt Ingersoll and the third of said parts to the children of my sister Maud M. Angell, now deceased, and their heirs forever *per stirpes*, and in case of the death of any of said children before my death, leaving issue, I direct that such issue shall take the share of his or her deceased parent *per stirpes*.”

All the devisees named in this clause are living and have been made parties to this action.

The will bears date April 11, 1906. The testatrix died February 23, 1911. The proof shows that at the time of her death she was possessed of personal property of the value of about \$16,000, and that her debts, the expenses of administration and other miscellaneous expenses amounted to \$7,049.20. There was, therefore, cash available to pay only about forty per cent. of these unlapsed general legacies. In addition to the New Haven house which the testatrix devised, as above mentioned, she had no real estate at the time of her death except an undivided one-third interest in what was known as the old Pratt homestead, at Prattsville, Greene county, which interest was worth about the sum of \$1,000.

The plaintiff insists that under the 38th or residuary clause of the will the interest of the testatrix in the Prattsville property, which constituted a part of her residuary estate, is chargeable with the payment of general legacies, because of the insufficiency of her personal estate to satisfy the same and that the 38th clause of the will by implication at least clothed the executor with a power of sale of such real estate for the purpose of paying legacies. This position is controverted by the devisees mentioned in the 38th clause.

The contention of the plaintiff cannot be maintained, unless from the will and the surrounding circumstances relating to the estate of the testatrix at the time the will was made there can be found a clear and manifest intention on her part to charge her legacies upon the lands. *Morris v. Sickley*, 133 N. Y. 456; *McGoldrick v. Bodkin*, 140 App. Div. 196. The will was made nearly five years prior to the death of the testatrix and there is nothing in the proof, except the merest inference, that the condition and amount of the estate was the same at the time of the making of the will as at the time of her death. The

evidence is insufficient in my opinion to show that the testatrix intended to charge her real estate with the payment of these general legacies. It gives no light upon the question whether or not she suffered losses during the long period intervening between the making of the will and the date of her death. The residuary clause in question, on the other hand, furnishes in itself quite convincing evidence that she at least supposed when she made her will that she would have a residue of personal property to be disposed of after the payment of her general legacies for that clause is comprehensive enough to cover personal as well as real property and that probably explains her direction to *divide* the same into three parts. The aid of the executor in dividing any personal property, undisposed of by the will, among her three classes of nephews and nieces—the children of her two brothers and her sister—would have been quite essential, but such aid would not be needed with respect to her real estate, for she had but two pieces of realty, one of which she effectually devised by her will, leaving a single piece, a country homestead, which the proof shows could not be well divided, to fall into the residue and her interest in which she devised to these three classes in equal parts.

I do not think that the direction to divide in this residuary clause can be fairly construed, under the circumstances of this case, as a power of sale in the executor to divide the residue into three parts, but this direction is followed by a devise and bequest of one of said parts to the children of each of her two brothers and of her deceased sister. Therefore, the rule that where there is no direct gift except that contained in a direction to pay or divide in the future has no application here, and even that rule is not absolute, but must always yield to the intention of the testator, as found in the entire will and the surrounding circumstances. *Roosa v. Harrington*, 171 N. Y. 341, 349 *et seq.*; *Goebel v. Wolf*, 118 id. 412. I think, therefore, there

has been a vesting in these three classes of nephews and nieces of the interest of the testatrix in the Prattsville property, that the will gives no power of sale thereof to the executor and that the undivided interest of the devisees in such property is fixed by the will and by the law, without any aid or need of aid on the part of the executor in making a division.

Findings and judgment in harmony with this opinion, with one bill of costs to the plaintiff and one bill of costs to the infant defendants appearing by guardian *ad litem*, payable out of the fund, may be presented for signature.

Ordered accordingly.

FREDA MARGARETTA FABER, Plaintiff, v. KATHARINA HAUCK
and Others, Defendants.

(Supreme Court, Kings Special Term, April, 1913.)

**WILLS—CREATION OF TRUST—PAYMENT OF PRINCIPAL TO ISSUE DOES NOT
DELAY VESTING BUT IS ONLY A POSTPONEMENT OF TIME OF PAYMENT—
RESIDUARY ESTATE—SUSPENSION OF POWER OF ALIENATION.**

Where testator by his will created a trust in his estate, one-third of the income to be paid to his wife during her life or until she remarried, and one-third to each of his two daughters, with provision that upon the death or remarriage of the widow her one-third interest should be given to the daughters, share and share alike, so that they would receive the income from the entire estate, one-half going to each during her life-time, there is not one indivisible trust but two trusts, each of which ends with the life of each daughter, and there is, therefore, no suspension of the power of alienation during three lives in being.

A provision of the will that the principal was not to be paid to the issue of said daughters until they severally attained full age does not delay vesting, but is only a postponement of the time

of payment; and immediately upon the death of either of said daughters their issue, respectively, become vested with an estate in fee of one-half of the estate of testator and entitled to the income thereof, the principal to be paid upon their attaining majority, the executor or trustee having simply a power in trust over the property.

A provision that in the event of either daughter dying without issue the whole of testator's residuary estate be given to the children of the surviving daughter, share and share alike, the "whole" intended was the one-half in trust for the daughter dying without issue, and in that event said one-half immediately vested in the living issue of the remaining daughter.

A gift of the entire residuary estate, after the death or remarriage of testator's widow, to a hospital and other named corporations, in the event of the death of both of testator's children without issue or descendants is dependent upon both daughters dying without issue, so that if the share of one so dying cannot vest in any issue of her surviving sister because she at that time has none it cannot pass to the residuary legatees as the living daughter may have issue at any time during her life, and the one-half estate would not, therefore, vest during two lives in being, and the suspension of the power of alienation would transgress the rule; should such a contingency arise said one-half estate would pass to the heirs and next of kin of testator.

Such violation of the statute against suspension of the power of alienation only affects, however, this attempted disposition under such a state of facts, and is separable from the other valid trust provisions.

A house and its contents given to testator's widow for life, free of all charges, in addition to the one-third of the income from the remaining estate upon her death becomes part of the trust estate.

ACTION for the construction of a will.

William Murray, for plaintiff.

Charles Reinhardt, for defendants Katharina Hauck and Freda Margaretha Faber.

Bamberger & Lowenthal, for defendant Herman Reiners.

CRANE, J.—This action is brought for the construction of the will of Frederick Hauck, who died in Kings county on or about April 20, 1912, leaving real and personal property and a wife and two daughters. It is unnecessary to set forth the provisions of the will at length, as the conclusions to which I have come will be sufficient.

The testator created a trust in his entire estate, one-third of the income therefrom to be paid to his wife during her life or until she remarry, and one-third to each of his two daughters Freda and Emma. Upon the death or remarriage of his widow, her one-third interest is given to each of the daughters, share and share alike, so that they will then receive the income from the entire trust estate, one-half going to each during her lifetime. But this does not constitute a suspension of the power of alienation during three lives in being, as the provisions do not constitute one indivisible trust but two trusts, each of which ends with the life of each daughter. Upon the death of Freda, her one-half of the estate immediately becomes vested in her lawful issue, with, of course, full power of alienation, so that at the termination of the trust in this half, the power of alienation has been suspended during the lifetime of the widow and the lifetime of her daughter Freda, two lives in being. The same result and direction apply to the one-half held in trust for the other daughter Emma. It is true that the will provides "the principal, however, not to be paid to them (the issue of Emma and Freda) until they severally attain full age;" but this is only the postponement of payment and not any delay in vesting; immediately upon the death of Freda or Emma their issue respectively become vested with an estate in fee of one-half of the estate of the testator, and entitled to the income therefrom, the principal to be paid upon their attaining majority. The executor, trustee in such case, would not have the title to but a power in trust over the property. *Quade v. Bertsch*, 65 App.

Div. 600; 173 N. Y. 615; *Steinway v. Steinway*, 163 id. 184; *Bliven v. Seymour*, 88 id. 469.

There is no question apparently among all of the parties to this litigation, that thus far the will is to be construed as I have stated.

In case either Freda or Emma should die without issue, the will makes this provision: "If either of my said daughters should die without issue, I give the *whole* of my said residuary estate equally to and among the children of my surviving daughter equally, share and share alike."

The use of the word "whole" is somewhat perplexing, but it is quite evident that the testator did not intend that the share of the one dying without issue should be held in trust or suspense until the death of the other daughter and then pass to the issue of the latter remaining at her decease. Of course, as he had given the remaining daughter a life estate, the "whole" of his residuary estate could not pass until her death, unless the trust were to end prior thereto, because of this devise of the "whole of my residuary estate." But clearly such was not the testator's intention. It is quite evident that the "whole" referred to or intended was the one-half in trust for the daughter dying without issue. Upon the happening of such event, this one-half immediately vests in the living issue of the remaining daughter. As the law favors the vesting of estates where such construction is possible and not contrary to the evident intention of the testator, I so read the will, convinced that it is a reasonable interpretation thereof. *Matter of Baer*, 147 N. Y. 353.

However, there is a contingency which may arise, making the subsequent provision as to one-half of this estate either void as suspending the power of alienation, or else its disposition is unprovided for. Should one of the daughters die without leaving issue, and the other daughter have no issue then

living, the one-half trust estate would not vest in any one mentioned by the testator in his will. The devise or bequest to the various named institutions is in words following: "In case of the death of both of my children without issue or descendants, then I give, devise and bequeath the whole of my said residuary estate, after the death or remarriage of my wife, as follows: To the German Hospital Society of Brooklyn, located at the corner of St. Nicholas Avenue and Stanhope Street, in the Borough of Brooklyn, City of New York, the sum of Fifty thousand dollars," etc.

The gift to the hospital and other named corporations is dependent upon both daughters dying without issue, so that if the share of one daughter, in the case of her death without issue, cannot vest in any issue of her sister because she at that time has none, it cannot pass to the hospital and other residuary legatees as the living daughter may have issue any time during her life. The one-half estate would not, therefore, vest during two lives in being, and the suspension of the power of alienation would transgress the rule. Should such a contingency arise, the one-half estate would pass to the heirs and next of kin of the testator.

Such violation of the statute against suspension of the power of alienation only affects, however, this attempted disposition under such a state of facts, and is separable from the other valid trust provisions. *Chapl. Susp. Alien.* (2d ed.) § 430, *et seq.* *Matter of Mount*, 185 N. Y. 162.

Both children dying without issue or descendants during the lifetime of the widow would enable the entire estate to pass on her death or remarriage to the residuary legatees named; but, should there be issue of the deceased daughters living at the death of the widow, they would take the estate in fee, share and share alike, subject only to the deferred possession or payment clause.

There remains but one question for consideration, and that is the apparent life estate created for the widow in No. 246 Hart street. The testator intended to give and did give one-third of the income from his estate to his widow, and he also gave her this house and its furnishings, directing that the trustees pay all taxes, assessments, insurance and repairs on it. So the widow has the house and contents for life, free of all charges, also one-third of the income from the remaining estate. This house, on the death of the widow, becomes part of the trust estate, one-half of which is given to each of the testator's named daughters.

Judgment accordingly.

Matter of the Final Judicial Settlement of the Account of DAVID CROMWELL, as Substituted Trustee of and under the Last Will and Testament of BENJAMIN DISBROW, Late of the Town of White Plains, Westchester County, New York, Deceased.

(Surrogate's Court, Westchester County, May, 1913.)

DESCENT AND DISTRIBUTION—BEQUEST OF LIFE INTEREST IN INCOME—
BEQUEST OF PRINCIPAL TO LAWFUL ISSUE PER CAPITA AND NOT PER
STIRPES.

Where testator's daughter, to whom he had bequeathed a life interest in the income of a one-sixth part of the residue of his estate, with a bequest of the principal to her lawful issue at her decease, dies leaving her surviving three children and seven grandchildren said estate is to be distributed *per capita* and not *per stirpes*.

PROCEEDING upon the final judicial settlement of the accounts of a substituted trustee.

Platt & Aiken, for petitioner.

J. Ambrose Goodwin, special guardian.

Frederick B. Van Kleeck, Jr., for Harry D. Ramsdall.

SAWYER, S.—The petition presented in this matter was for the final judicial settlement of the account of David Cromwell, as substituted trustee of and under the last will and testament of Benjamin Disbrow, deceased.

The decedent died on or about the 6th day of December, 1853, leaving a last will and testament and a codicil thereto. The will and codicil were duly admitted to probate by the surrogate of Westchester county, December 26, 1853.

The decedent left him surviving one son and five daughters.

After certain bequests, together with a life interest to his wife, the testator devised and bequeathed unto his son a sixth part of the residue of his estate and to each one of his daughters he bequeathed the income of one-sixth part of his residuary estate during the natural life of each.

The ninth clause of the will reads as follows:

“*Ninth.* I give and bequeath unto my daughter Harriett M. Disbrow the interest and income of the remaining one-sixth part of the residue of my estate during her natural life and after her decease, I give and bequeath the prinicpal to her lawful issue.”

The said Harriett M. Disbrow, mentioned in the ninth clause of the will, departed this life on the 22d day of July, 1912, leaving her surviving three children and seven grandchildren.

The question presented on this accounting is whether the fund to be distributed shall be paid, one-quarter each to the three surviving children and one-quarter to the four grandchildren whose parent is deceased, or whether there shall be

a *per capita* distribution in which all of the children and grandchildren shall share equally. In other words, shall the distribution be *per stirpes* or *per capita*.

A careful consideration of the will fails to disclose any words which could be construed as an intention on the part of the testator that the bequest after the decease of his daughter, Harriett Disbrow Ramsdall, should be limited only to her children.

The ninth clause of the will specifically devises and bequeaths to his daughter Harriett a life estate, and after her decease "I give and bequeath the principal to her lawful issue."

It is well settled in this state that the words "lawful issue" when used in a will and unexplained by the context, have the meaning of descendants and where the words are used without any terms in the context to qualify their meaning the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares *per capita* and not *per stirpes* as primary objects of the disposition. *Schmidt v. Jewett*, 195 N. Y. 486; *Soper v. Brown*, 136 id. 244; *Drake v. Drake*, 134 id. 220; *Matter of Bauerdorf*, 77 Misc. Rep. 656; 2 *Jarman Wills*, 635, 636; 1 *Bouvier L. Dict.* 1124.

Clearly it was the intention of the testator under his will to have his estate distributed *per capita* and not *per stirpes*.

Decreed accordingly.

MARGARET A. BROOKMAN, Plaintiff, v. THOMAS B. TUTHILL and JOSEPH E. BOARD, as Executors, etc., of MARY K. TUTHILL, Defendants.

(Supreme Court, Orange Trial Term, May, 1913.)

WILLS—CONSTRUCTION OF—DEVISE OF FARM IN EQUAL SHARES TO TWO DAUGHTERS—CHARGE ON FARM OF LEGACY—DEVISE IN TRUST, WITH REMAINDER OVER.

While the courts may not rewrite wills they must correct inaccurate expressions and give effect to the evident intent of testators.

Where a devise of a farm to two daughters of the testatrix, in equal shares, provided that, if one of the devisees should die before the testatrix, her share should go to the other children, but in case said devisee sold her interest in the farm it was charged with the payment of a legacy of \$500, and by codicil the devisee's interest in case of sale was charged with the payment of \$1,500 to be held in trust for her during her lifetime with remainder over, and on her death still owning her interest in the farm the payment of the \$1,500 was to be a charge "upon said farm," it will be held that testatrix intended in any event to make the \$1,500 a charge on the interest or share of said daughter in the farm, which was sold after her death, and in no event to make it a charge on the whole farm, the words "I charge said farm" being inadvertently used and an inaccurate expression of testamentary intention.

ACTION for the construction of a will.

Joseph W. and Percy V. D. Gott, for plaintiff in error.

Graham Witschief, for defendant in error.

TOMPKINS, J.—This action is for the construction of the last will and testament and codicil of Mary E. Pierson, deceased. The will provides as follows:

"Second. I give, devise and bequeath my farm situated in the said Town of Hamptonburgh, and containing about one hundred and thirty-six acres more or less and being the home-stead farm of Oliver Thompson deceased, together with all the personal property and live stock on said farm, to my two daughters, Mary K. Tuthill, wife of Thomas B. Tuthill, and Margaret A. Woodhull, wife of George E. Woodhull, equally, share and share alike, and if my said daughter Margaret shall die before I do, I give her equal half part of said property to her son Nathaniel; and if my said daughter Mary shall die before I do, I give her equal half part of said property to my other two children share and share alike; but I charge upon the interest of my daughter Mary in said devise, the payment to my executors hereinafter named of the sum of five hundred dollars in case she shall sell her interest in said farm which sum shall be held in trust by my said Executors and kept invested and the interest paid to my said daughter, Mary, during the rest of her natural life and at her death said principal sum shall be paid to Nathaniel D. Woodhull, my grandson, aforesaid, if living, if not, then to my other two children equally and their heirs; and if my said daughter Mary shall die, still owning her interest in said farm, I charge upon said farm the payment of said legacy of Five Hundred Dollars, to said Nathaniel D. Woodhull within one year thereafter, if he be still living."

The material provisions of the codicil are as follows:

"I revoke all the provisions therein contained which charge upon the interest of my daughter Mary, in the farm bequeathed to my daughters in and by the terms of said Will, the payment of the sum of \$500.00 and I make the following provision in the place thereof. I charge upon the interest of my daughter Mary, in said devise the payment to my said executors of Fifteen Hundred Dollars, (\$1500) in case she shall sell her interest in said farm which sum shall be held in trust by my

said executors and kept invested and the interest paid to my said daughter Mary, during the rest of her natural life, and at her death I direct my said executors to pay the principal of said sum of \$1500.00 to my daughter Margaret, or if she be then dead, to my son George M. Pierson; and if my said daughter Mary shall die still owning her interest in said farm, I charge upon said farm the payment of said legacy of Fifteen Hundred Dollars, to my daughter Margaret within one year thereafter if she be then living; and if my daughter Margaret be not then living, said legacy shall be paid to my son George M. Pierson."

The daughter Mary died owning her half interest in the farm which has, since her death, been sold, and the question now to be determined is whether the testatrix intended in such an event to charge upon the whole farm the payment of the \$1,500 provided by the codicil to be paid to the other daughter Margaret A., who is the plaintiff in this action, or whether it is chargeable only against the share of the deceased daughter Mary.

A careful study of the will and codicil leads to the conclusion that the testatrix intended in any event to make the \$1,500 a charge upon the interest or share of her daughter Mary, and in no event to make it a charge upon the whole farm. The words in the will, and repeated in the codicil "and if my said daughter Mary shall die, still owning her interest in said farm, I charge upon said farm the payment of said legacy" give an inaccurate expression of her intention; the testatrix intended by her will and codicil to charge said amount upon her daughter Mary's interest in said farm. The wording of the codicil is exactly like that of the will. The testatrix, when making the codicil, undoubtedly copied, or had copied, the words from the will. They are identically the same, except as to the amount, which is changed from \$500 to \$1,500, so that the clause in the codicil means only what the clause in the will means, and the meaning of the clause in the will, or perhaps rather, the intention of the

testatrix in making the will, and her interpretation thereof, are all found in that clause of the codicil, which reads as follows: "I revoke all the provisions therein contained, which charge upon the interest of my daughter Mary in the farm bequeathed to my daughters in and by the terms of said will, the payment of the sum of \$500.00, and I make the following provision in the place thereof."

From this clause in the codicil, it appears that the testatrix understood that the entire clause of the will making the charge related only to the interest of Mary in the farm and not in any way to the interest of Margaret, and the charging clause in the codicil cannot be construed as more comprehensive. The rule that: "A devise subject to a charge in favor of the devisee is such an unusual method of giving away property as to raise the question at once whether that was the actual intention" (Kinkele v. Wilson, 151 N. Y. 269) is to be considered, and to so hold in this case would be hostile to the general plan of the testatrix, which was to charge upon Mary's interest the payment of \$1,500 to Margaret. There is nothing in the will or codicil, except the language to be here construed, which in any way shows an intention to reduce that charge one-half, if Mary did not sell her interest during her lifetime.

It seems to me clear that the testatrix intended, in the event of the death of her daughter Mary, that the \$1,500 should be a charge upon her interest in the farm, and that the words "I charge upon said farm" were inadvertently used, and were an inaccurate expression of her intention. To hold otherwise would mean that if the farm had been sold during Mary's lifetime, \$1,500 would have been taken out of her share of the proceeds, while now that the farm has been sold since her death, her husband, who is the devisee under her will, would be called upon to pay only the sum of \$750.

While the courts may not rewrite wills, they must correct in-

accurate expressions, and give effect to the evident intent of the testator. *Phillips v. Davies*, 92 N. Y. 204.

The plaintiff is entitled to judgment decreeing that the codicil be construed so as to read: "If my said daughter Mary shall die still owning her interest in said farm, I charge upon her said interest in said farm, the payment of said legacy of \$1,500 to my said daughter Margaret, within one year thereafter."

Judgment accordingly.

FRANK B. TORREY, as Executor of and Trustee Under the Last Will and Testament of EDWARD WARREN DAY, Deceased, Plaintiff, v. ELBERT H. DAY, GEORGE K. DAY, FREDERICK C. DAY, EVELYN H. BRUNER and THOMAS CARMODY, as Attorney-General of the State of New York, Defendants.

(Supreme Court, Kings Special Term for Trials, May, 1913.)

WILLS—BEQUEST TO CHARITY—CHARITABLE PURPOSE UPHOLD—EXECUTORS AND ADMINISTRATORS.

The principle is now firmly established that if a charitable purpose pervades and dominates a bequest the scheme and purpose of the testator should be upheld in the courts.

A bequest to the cause of charity, to be expended by the executor at such times and in such amounts as he may "elect to disperse; to worthy individual cases and to various institutions dedicated to the cause and alleviation of human physical suffering," calling the earnest attention of the executor to the dire necessity of inadequately endowed hospitals and institutions of like character, but earnestly and heartily disapproving of his rendering any financial assistance to institutions engaged in the practice of establishing and maintaining foreign missions, is valid.

ACTION for the construction of a will.

Miller, King, Lane & Trafford, for plaintiff.

James R. Speers, for defendants Elbert H. Day, George K. Day and Frederick C. Day.

George W. McKenzie, for Evelyn H. Bruner.

Thomas Carmody, Attorney-General.

MANNING, J.—This case involves the construction to be placed upon the residuary clause of the testator's will, the exact wording of such clause being as follows:

"I give and bequeeth the ballance to the Cause of Charity, to be expended by my executor at such times and in such amounts as he may elect to disperse; to worthy individual cases and to various institutions dedicated to the cause and alleviation of human physical suffering, calling his attention to the dire necessities of inadequately endowed hospitals, or those insufficiently appropriated for by legislative or governmental provision, such indifference and neglect constituting a stain upon justice and human decency of a christian community, badly saturated with impure luxuries and extravagant excesses. To institutions of this character, dispensing aid and assistance, I commend his earnest attention, but, to institutions engaged in the practice of establishing and maintaining foreign Missions, I earnestly and heartily disapprove of his rendering any financial assistance whatever."

If by any possible rule of construction, doubt or uncertainty could be attributed to the gift in question, it seems to me that the situation is materially cleared by legislative enactment and the trend of judicial decisions pronounced within recent years. The principle is now firmly established that if a charitable purpose pervades and dominates the bequest, the scheme and purpose of the testator should be upheld and enforced.

It will be noticed that the testator specifically makes the

gift "to the Cause of Charity." This is the basic designation of his bounty. He further directs that the amount of his bequest "be expended by my executor at such times and in such amounts as he may elect to disperse; to worthy individual cases and to various institutions dedicated to the cause and alleviation of human physical suffering, calling his attention to the dire necessities of inadequately endowed hospitals, * * *" and his intent is further emphasized by the objection to any part of his estate being given to "maintaining foreign Missions."

Hence, if the will be given the just, equitable and liberal construction which the courts in recent years seem disposed to give to similar testamentary documents, there seems to be no good reason why this clause should not be upheld.

The law relative to charitable bequests and trusts has been so recently discussed and settled by the Court of Appeals, it would serve no useful purpose to attempt a review of the question. The following authorities seem applicable to the case at issue here, and a reference to them is all that seems necessary. Laws of 1893, chap. 701; Pers. Prop. Law, § 12; Real Prop. Law, § 113; Matter of Cunningham, 206 N. Y. 601, and cases therein cited; Matter of Robinson, 203 id. 380; Matter of Davis, 77 Misc. Rep. 72; affd. by App. Div. in Memorandum opinion, April, 1913.

The clause of the testator's will in issue is construed as a valid one in accordance with the foregoing memorandum.

Judgment for the plaintiff, upholding the gift. Costs to all parties appearing and filing briefs to be paid out of the estate.

Judgment for plaintiff.

FREDERICK C. BOYNTON et al., as Trustees Under the Last Will and Testament of THEODOSIA BOYNTON, Deceased, Plaintiffs, v. ELINOR v. LAHENS and Others, Defendants.

(Supreme Court, New York Special Term, June, 1913.)

WILLS—BEQUEST OF RESIDUARY ESTATE, ALL PERSONAL, TO TRUSTEES—INTENTION OF TESTATRIX—VESTING.

Where testatrix, who was survived by five adult children, one of whom, a son, died intestate, married and without issue and two of the other children are married and have minor children, bequeathed her residuary estate, all personalty, to trustees in trust (1) to hold and invest the same and collect the income therefrom and pay the same to her children share and share alike during their respective lives; (2) on the death of any of said children the trustees were directed to pay to him or her issue, share and share alike, one equal part of the estate on the basis of a division thereof into as many parts as there shall be children surviving testatrix; (3) "In case any of my said children shall leave no issue him or her surviving, then I direct that said share set apart to him or her in trust as aforesaid shall be disposed of as he or she may direct by his or her last will and testament, and failing such disposition by him or her, then I direct that such share shall fall into my residuary estate and be distributed as hereinbefore provided. (4) In case any of my said children shall predecease me, leaving issue him or her surviving, then I direct my said trustees to pay over to such issue, share and share alike, that portion of the income of my said estate to which such child would have been entitled if living, and on the death of any one of the other surviving children, then I direct my said trustees to pay to said issue, share and share alike, one equal part of said estate as provided in subdivision 2 thereof;" the testatrix intended that in the event of the death of any child without issue surviving and without disposing of its share by will, the share of such child should be divided into as many subshares as there were children then surviving, which subshares should be added to and form a part of each of the subsisting trusts; that, upon the death of each child, the subshares so added should vest in its issue, if any; that if any such child should

die intestate and childless the subshare held for such child should vest in the decedent's next of kin, if any, as of the date of decedent's death.

ACTION for the construction of a will.

Daly, Hoyt & Mason, for plaintiffs.

Joseph L. Delafield, for defendants Chester C. Boynton and Elinor V. Lahens.

Joseph V. Gallagher, for defendant Nathalie Boynton.

W. Holden Weeks, guardian ad litem.

GUY, J.—This is an action for a construction of the will of Theodosia Boynton, deceased. The testatrix died January 25, 1908, leaving her surviving five adult children; four of whom are now living; her son, Theodore V. Boynton, having died on November 15, 1911, intestate, married and without issue. Two of the testatrix's surviving children are unmarried, the other two are married and both of them have surviving minor children. The testatrix's two surviving married children contend that the tenth clause of the testatrix's will is void as unlawfully suspending the ownership of the residuary estate, which the account shows is all personalty, for more than two lives and that the testatrix died intestate as to her entire residuary estate. The guardian for the infant children of the testatrix's two surviving married children claims that the five trusts set up in the residuary clause are all valid and that the one-fifth share held in trust for the testatrix's since deceased son, Theodore V. Boynton, should be divided into four equal parts or subshares, each of which subshares should be added to and form a part of one of the four subsisting trusts, and upon the death of

each child the subshare so added should vest *in the then next of kin of the testatrix*. The residuary clause of the testatrix's will reads: "Tenth. All the rest, residue and remainder of my estate, I give, devise and bequeath to my trustees hereinafter named in trust, nevertheless, for the following uses and purposes, namely: (1) To hold and invest the same and collect the income therefrom and pay such income to my children, share and share alike, during their respective lives. (2) On the death of any of my said children, I direct my said trustees to pay to his or her issue, share and share alike, one equal part of my said estate, on the basis of a division thereof into as many parts as there shall be children me surviving. (3) In case any of my said children shall leave no issue him or her surviving, then I direct that said share set apart to him or her in trust as aforesaid shall be disposed of as he or she may direct by his or her last will and testament, and failing such disposition by him or her, then I direct that such share shall fall into my residuary estate and be distributed as hereinbefore provided. (4) In case any of my said children shall predecease me, leaving issue him or her surviving, then I direct my said trustees to pay over to such issue, share and share alike, that portion of the income of my said estate to which such child would have been entitled if living, and on the death of any one of the other surviving children, then I direct my said trustees to pay to said issue, share and share alike, one equal part of said estate as provided in subdivision 2 thereof." The five trusts set up by the residuary clause of the will are not indivisible or joint nor do they create a blended trust fund, but they are independent, separate and distinct, the beneficiaries take as tenants in common, and the power of alienation of each share is only suspended during the lives of the two successive beneficiaries, during which that share with its respective subshare is limited. *Schey v. Schey*, 194 N. Y. 368, 373-375; *Chastain v. Dickin-*

son, 138 App. Div. 746, 751-752; *affd.*, 201 N. Y. 538-543, 544; *Vanderpoel v. Loew*, 112 id. 167, 177, 180-186; *Matter of Mount*, 185 id. 162, 169, 170, *Smith v. Edwards*, 88 id. 92-103; *Moore v. Hegeman*, 72 id. 376, 382-384; *Stevenson v. Lesley*, 70 id. 512, 515, 516; *Amory v. Lord*, 9 id. 403, 415, 416; *Chapl. Sus. Alien.* (2d ed.) §§ 100-112. Although the principal of the trust fund is held in one general mass for convenience of investment, yet the primary beneficiaries' interests, as well as the successive beneficiaries' interests, are several and are held by them respectively as tenants in common, even though the fund remains undivided. *Leach v. Godwin*, 198 N. Y. 35, 41. No contingency resulting from the uncertainty as to which of the alternative future estates in the subshares will vest or fail to vest could create any restraint on the power of alienation of the remainder. *Real Prop. Law*, § 51; *Hennessey v. Patterson*, 85 N. Y. 91, 99; *Knowlton v. Atkins*, 134 id. 313, 317-322. The cases where trusts in joint tenancy for the lives of more than two persons, blended trust funds to be held intact until the death of the last of more than two beneficiaries, and trusts of personal property to continue during the lives of persons not in being at the creation of the trust, have been held invalid, are not in point. The testatrix intended, and I see no legal difficulty in the carrying out of such intention, that in the event of the death of any child without issue surviving and without disposing of its share by will, the share of such child should be divided into as many subshares as there were children then surviving, which subshares should be added to and form a part of each of the subsisting trusts; that, upon the death of each child, the subshares so added should vest in its issue, if any; that if any such child died intestate and childless the subshare held for such child should vest in the decedent's next of kin, if any, as of the date of decedent's death. *Matter of Wilcox*, 194 N. Y. 306; *Clark v. Cammann*, 160 id.

316, 328, 329; *Greenland v. Waddell*, 116 id. 234-245. Judgment construing the will accordingly, with costs to plaintiff and to the infant defendants.

Judgment accordingly.

Matter of the Judicial Settlement of the Account of GERTRUDE S. HIGGINS, as Administratrix, etc., of THOMAS C. HIGGINS, Deceased.

(Surrogate's Court, Kings County, May, 1913.)

EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNTS OF—ALLOWANCE OF AMOUNT PAID COUNSEL FOR SERVICES IN PROCEEDINGS TO REVOKE LETTERS—ACCOUNTING.

On the judicial settlement of the accounts of an administratrix, she may be allowed from the estate the amount paid to counsel for services in resisting a proceeding to revoke her letters in which it was found that she was the lawful widow of intestate and to have been at all times rightfully in office as administratrix.

PROCEEDING upon the judicial settlement of the account of an administratrix.

Jay & Smith (Alfred G. Reeves and William H. E. Jay, of counsel), for accountant.

Sparks & Fuller, for Edwin E. Higgins.

Wilbur & Yetter, for Edith Cooke and Mary Cooke.

KETCHAM, S.—The accounting administratrix asks that she be allowed from the estate the sums paid by her to counsel for

their services rendered in resisting a proceeding to revoke her letters. In that proceeding her removal was sought upon the sole ground that she was not the widow of the intestate, and the result, to which the efforts of her counsel contributed, was that she was found to be the lawful widow and to have been at all times rightfully in the office of administratrix.

Whatever may be the rule in a case where an officer merely escapes removal without an affirmative finding that he has an inherent and unquestionable right to the office, it must be that when an administrator has been threatened in the office to which he is finally found to be entitled the estate should bear the expense which the unwarranted attack has imposed upon the rightful incumbent.

An administrator whose right to the office is finally vindicated has always been in the place where the law stationed him. He has made oath that he would discharge its duties. He has no right to surrender his office merely by his own will. He can only be released by permission and upon proof of the facts which justify his discharge.

Hence, if it turn out that he has belonged in the office at all times since his appointment, it must result that it has always been not only his privilege, but his duty, to stay where he belonged. To hold on to the charge which has been properly intrusted to him is only one of the duties of his administration, and the just and reasonable expense attendant upon any performance of his duty is chargeable upon the estate.

But in this case the administratrix, in vindicating her title to the office, obtained a finding which also established her right to an interest in the estate of her intestate, and it is, therefore, urged that her disbursements in obtaining that result were made in her own behalf and were not in the interest of the estate.

The primary subject of the controversy in which these fees

were incurred was the office of administratrix. Her right and duty to defend that office were not lessened by the incident that the facts necessarily shown in defense of her office were also conclusive upon other rights and interests personal to herself. If an administrator is ordinarily to be allowed compensation for his expense in maintaining the office solely because he ought to keep it, why should the concurrence of a selfish incentive for doing his manifest duty make that duty any less?

The reasoning upon which this allowance is resisted would make it impossible ever to indentify any person rightfully holding the office for any expense incurred in defending his right thereto, for it is difficult to conceive of an office the incumbent of which is not entitled to compensation for the discharge of his trust.

The case of *Ordway*, 196 N. Y. 95, contains nothing against the claim of the administratrix and much to justify her claim. The counsel fees there considered were not incurred in defense of the office. They arose in defending an action brought against the estate in which the right of the administratrix as such was necessarily confessed. It was there held that the administratrix was entitled to reimbursement for counsel fees paid for a service which was incidentally for her own selfish benefit so long as such service was not unduly prolonged "to the time when any further defense in the interest of the estate became manifestly unnecessary."

The difference between the cases is vital. Here the administratrix made a defense which under the law was proper. If it were ever proper its propriety continued until it ended in success. It, therefore, never could become unnecessary.

In the case cited the defense to the action was proper only so long as it continued to be necessary. Moreover, the court there held that the expenditures made before it appeared that the

defense was unnecessary to the interests of the estate were properly allowable to the administratrix.

This was a clear recognition that disbursements, in their nature chargeable to the estate, are not less chargeable, because they also serve the personal interest of the administrator who makes them.

The items of credit claimed in the account for professional services of counsel are allowed.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of GEORGE W. TITCOMB, as Sole Surviving Trustee under the Last Will and Testament of DANIEL J. RUNYON, Deceased.

(Surrogate's Court, Kings County, May, 1913.)

EXECUTORS AND ADMINISTRATORS—GRANTING OF ALLOWANCE FOR COUNSEL FEES IN RESISTING REMOVAL FROM OFFICE—EXPENDITURE MADE IN DUE COURSE OF ADMINISTRATION.

TRUSTEES—REMOVAL OF—ALLOWANCE TO, FOR COUNSEL FEES.

An executor or trustee may be granted an allowance for counsel fees paid in resisting an effort to remove him from office only on the theory that the expenditure was made in due course of administration and for the benefit of the estate; that he was successful in avoiding removal is not of itself sufficient to justify the allowance.

Where a trustee made an investment in the bonds of an industrial corporation secured by the usual mortgage to a trustee, and during the trial of a proceeding to remove him, in which the facts as to such investment were shown and its unlawfulness asserted, the trustee sold the bonds without loss and reported that he had received and held the proceeds in place of the bonds, the services of

counsel in the proceeding were not rendered for the benefit of the estate and there can be no allowance to the trustee for counsel fees, nor for sums paid to a real estate expert whose services were primarily directed to the defense of the removal proceedings and in no way required for any general need of the estate.

PROCEEDING upon the judicial settlement of the account of a sole surviving trustee.

Jones, McKinny & Steinbrink (Meier Steinbrink, of counsel), for trustee.

Henry G. K. Heath, for Ralph C. Runyon, contestant.

Shepard & Houghton, for Bertram S. Teeter and other legatees, contestants.

Morris Cohen, special guardian for Josephine M. Randolph, an incompetent.

KETCHAM, S.—The only theory upon which allowance can be made to an executor or trustee for counsel fees paid by him in resisting an effort to remove him from office is that the expenditure was made in the course of administration and was made for the benefit of the estate.

That the office is valuable to the incumbent and that his personal interests are concerned in maintaining it is of secondary significance if it be shown by the event that the officer was justly entitled to retain his office. If it be found that he rightfully resisted removal, it must follow that his resistance was made not only in the exercise of a personal right but in the pursuit of a duty, and any outlay made in the discharge of an obligation to the estate must be regarded as an expense which the estate should bear.

The allowance is not to be made merely because the party seeking it has succeeded in avoiding removal.

The test must be applied to the situation of the accused officer at the time of the commencement of the proceeding. If then there was no ground for the attack upon him, his disbursement made in a successful endeavor to show that no such ground existed should be allowed as an incident to his discharge of a legal duty to the estate.

But if at the commencement of the proceeding he was subject to criticism such as would justify his removal, and pending the proceeding he has so dealt with the estate that the conditions upon which the criticism depended no longer exist, he should be denied indemnity for his outlays.

This is illustrated by the case in which an executor whose circumstances are such that they do not afford safety to the fund in his charge escapes removal by giving the bond permitted by the statute. In such instances reimbursement for counsel fees incurred in the removal proceeding should, doubtless, be refused.

In the case at bar the trustee made an investment in the bonds of an industrial corporation, secured by the usual mortgage to a trustee. During the trial in which the facts of this investment were shown and its unlawfulness was asserted, the trustee sold the bonds without loss and reported that he had received and held the proceeds in place of the bonds. The estate was thus shown to be secure and the application for removal was denied.

If the investment was unauthorized the proceeding was authorized, and its defense could not have been originally in the interest of the estate.

The only duty which rested upon the accountant, if his holding was unlawful, was to confess his error as soon as it was

challenged. Failing this, none of the services of counsel in the proceeding were rendered for the benefit of the estate.

Hence, there can be no allowance to the trustee for fees incurred in the proceeding, if by reason of his having improperly applied the moneys of the estate or invested the same in securities unauthorized by law he was at the time of the commencement of the proceeding unfit for the due execution of his office.

Not only were these bonds a form of security unauthorized by law, but in the taking of them the interests of the estate were subordinated to other interests.

So much of the items of counsel fees as were incurred in the removal proceeding must, therefore, be disallowed.

This ruling must also extend to the credits for sums paid to the real estate expert for appraisal and testimony. The expert's services were primarily directed to the defense of the removal proceeding and it is not shown that they were required by any general need of the estate.

The legal services rendered to the trustee in the general care of the estate are found to have been worth \$150, and this sum is allowed.

The objection to the reduction of interest on the \$30,000 mortgage from five and one-half to five per cent. is not supported by evidence. The trustee's account reports the reduction and unless objectants sustain the burden of showing its impropriety the account in this regard must prevail.

Decreed accordingly.

Matter of Proving the Last Will and Testament of FRANK CRAWFORD, Deceased.

(Surrogate's Court, New York County, May, 1913.)

WILLS—EXECUTED WITH LEAD PENCIL—STRIKING OUT CERTAIN TESTAMENTARY PROVISIONS—REVOCATION OF—DECEDENT ESTATE LAW, § 34.

Where a testator, after having duly executed his last will, struck out some of the testamentary provisions, added clauses and changed the amounts of many legacies, but the original words are plainly discernible beneath the pencil marks, the testator's signature is undefaced and material parts of the instrument as originally executed remain unchanged and uncanceled, such acts of testator will not be deemed to have been done *animo revocandi*.

Such acts even if made with intention to revoke the will would be inoperative, as under section 34 of the Decedent Estate Law a will cannot be revoked, either in part or in whole, by a cancellation of a part of the instrument.

PROCEEDING upon the probate of a will.

Harry C. Kayser, for proponent.

Frank J. Ryan, for contestant.

J. S. L'Amoreaux, for Mary Raymond Crawford.

Michael J. Horan, special guardian.

George L. Lewis, special guardian.

Joseph D. Kelly, for Mary Walsh Crawford.

COHALAN, S.—A paper purporting to be a last will and tes-

tament was duly executed by the decedent September 17, 1909. The paper so executed was in four sheets and consisted of four pages of typewriting. It appears that the testator subsequently became dissatisfied with the provisions of this instrument and made many material changes in it. Changes have been made in the amounts of the legacies in the second, fourth, fifth, sixth, seventh, thirteenth and fifteenth clauses. Part of the ninth clause has been changed and the numbering of that clause is changed from "ninth" to "eighth." Two diagonal lines have been drawn across part of the thirteenth clause in the form of the letter "X." About forty words written on the margin of the paper have been inserted in the fourteenth clause. Many other alterations are apparent on the paper that contains what is alleged to be the last will of the decedent. All these marks, cancellations and alterations are in lead pencil and according to the evidence were made by the testator himself after he had executed the original document. There were no marks or alterations of any kind upon the paper when it was executed as a will in the usual way before the subscribing witnesses. The typewritten words and figures of the original instrument can be read through the light pencil lines. The writing offered for probate as the last will and testament of decedent is that part of the paper which is in typewriting and which was executed by the decedent in conformity with the laws governing the execution of wills. Probate is contested on the ground that said alleged will was canceled by the testator in accordance with section 34 of the Decedent Estate Law. This section is as follows: "No will in writing * * * nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated

ated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself * * *." The ordinary meaning of the word "cancel" is to strike out by drawing lines across. Undoubtedly there was a cancellation of parts of the writing propounded herein for probate. There seems some doubt, however, on the question of intention. It seems to me that the testator made the alterations in pencil on the paper he had executed as a will, so that he might have at hand a convenient draft for a new will when he came to execute another one. The testator had the paper in its altered condition in his possession for a long time, and for all that any one knows he may have never fully decided to make a new will. But assuming that the acts of cancellation were done *animo revocandi*, counsel for the contestants overlooks the fact that a will cannot be revoked either in part or in whole by a cancellation of a part of the instrument. For any of the acts of destruction mentioned in the second part of section 34 to operate as a revocation the whole will must be affected. It is not reasonable to suppose that the most solemn act provided for by law can be done away with by a few strokes of a pen or pencil. As a safeguard against fraud the rule has been established that a will cannot be revoked by the cancellation or destruction of only part of the will. *Lovell v. Quitman*, 88 N. Y. 377. In the paper propounded for probate there are three or four immaterial changes in the tenth, eleventh and twelfth clauses. The third and sixteenth clauses are in the same condition, so far as any of the acts mentioned in the statute are concerned, as they were when the paper was executed by the testator, so that though the greater part of the paper offered for probate has been altered and canceled, there are material parts of it that remain unchanged and undefaced. It is important also to bear in mind that the signature was not canceled, destroyed or injured in any way. The four typewritten pages executed

by the decedent on September 17, 1909, without the alterations and pencil marks thereon will be admitted to probate as his last will and testament. *Lovell v. Quitman, supra*; *Matter of Curtis*, 135 App. Div. 745. Submit decision and decree and tax costs on notice.

Decreed accordingly.

Matter of Proving the Last Will and Testament of ANNA
MARIA BROWNING, Deceased.

(Surrogate's Court, New York County, May, 1913.)

WILLS—WHEN PROBATE GRANTED—EXECUTION OF, FOUR MONTHS PREVIOUS TO COMMITMENT TO STATE HOSPITAL FOR INSANE.

Where it appears that testatrix had delusions and that she had been taken to a private institution for the insane the day after she executed her will, that she had been legally adjudged insane and legally committed to a state hospital for the insane about four months after the execution of the will and died hopelessly insane thirteen years thereafter, and it also appears that she was rational on many occasions while she was in said hospital and that she was rational when she executed the will, probate will be granted.

PROCEEDING upon the probate of a will. Contested probate of a will.

Richard Dudensing, for proponents.

Hauff & Warland, for contestants, Joseph G. Browning, Jr., Isaac V. Browning, Minnie A. Feldman, Jane Pitt Gross.

Clinton & Olssen, for Mabel M. Kleinstuber.

Henry Herz, special guardian of contestants, Lucille Browning, William B. Higgins, Samuel K. Higgins, Jr., Harold H. Higgins and Harriet M. Higgins.

Edward Pitske, for Annie M. Browning.

COHALAN, S.—The paper offered for probate as the last will and testament of the decedent was executed October 24, 1897. The estate consists of personal property. The next of kin are a brother, Joseph G. Browning, two sisters, Barbara Browning and Jane Gross, and many nieces and nephews who are children of deceased brothers and sisters of the decedent. The will bequeaths a life estate to two aunts of decedent, Sarah and Anna Browning, if they survive the testatrix, with a remainder to "such of my beloved sisters, Barbara Browning and Jane Anna Pitt Browning (Jane Gross), who shall then be unmarried, never having been married, absolutely and forever." If both of the two sisters named had married, the property was to be divided equally among all of the sisters living at the death of the testatrix. Sarah Browning, one of the aunts named in the will, predeceased the testatrix, and the aunt named Anna Browning survived the testatrix. Barbara is the only sister of the decedent who remained unmarried, and under the terms of the will she has a remainder interest in the estate of the testatrix limited on a life estate to the surviving aunt. Barbara and her sister Jane are named in the will as executrices.

The probate of the paper propounded is contested by eleven nephews and nieces of the testatrix and by Joseph G. Browning and Jane Gross, a brother and sister of the testatrix. The proponent of the will is Barbara Browning, one of the two beneficiaries. Objections on the usual grounds were filed on behalf of all of the next of kin, except Barbara Browning.

At the trial the *factum* of the will was established and the

contestants produced many witnesses to show testamentary incapacity and the exercise of undue influence. The charge of undue influence is made against Barbara Browning, the sister of the testatrix, and the chief beneficiary of the will.

The decedent was one of seven children, whose mother died while the children were young. The father died in 1883, when the testatrix was about twenty years of age. After the mother's death the children were brought up by the two aunts—sisters of the father. The father lost his own and some of the aunts' money in investments, and it seems that he was very grateful to the two aunts for their unselfish devotion to him and to his children. This feeling of gratitude seems to have been shared by the testatrix and by her sister Barbara Browning, the proponent. In the course of time the brothers and most of the sisters married, while the testatrix and Barbara continued unmarried. Jane was married some years after the will was executed. Each of the girls had a small income from some real estate that they inherited from a grandfather, and this income enabled them to support themselves and the two old aunts with whom they lived prior to 1897.

The testatrix began to exhibit peculiarities and eccentricities when she was about eighteen years of age. The witnesses for the contestants testified to many acts of the testatrix extending over a period of ten or fifteen years prior to the execution of the will, and these acts were characterized by the witnesses as irrational. The testatrix was about thirty-four years of age when the will was executed in 1897. By this time her eccentricities had become so pronounced and her condition of health was such that a family conference of the brothers and sisters was held in September, 1897, when it was decided to send her to a private sanitarium. Accordingly, on October 25, 1897, she was admitted to "Interpines," a private institution at Goshen, New York. On October 21, 1897, testatrix

executed a power of attorney to her sister Barbara, and she executed her will at the home of a friend the evening before she went to the sanitarium. At this institution she could not be legally restrained, as she had not been legally committed there, and in January, 1898, accompanied by a nurse, she came to New York city, against the wishes of the superintendent. A day or two afterwards her brother Joseph and her sister Barbara had her legally adjudged insane before the special surrogate of Orange county, and on January 11, 1898, she was ordered committed to the Middletown State Hospital for the Insane. She remained there for about seven years and was "discharged unimproved" September 21, 1904.

Her hospital record while she was at the Middletown State Hospital is in evidence, and Dr. Ashley, the superintendent of that institution, has stated what he observed of the acts and condition of the testatrix while she was under his charge, and has stated his opinion of her mental condition based upon that observation. Dr. Ashley stated that in his opinion testatrix suffered from a paranoiac condition; that she was in an "exceedingly unstable emotional condition, manifested by frequent outburst of temper;" that she was "pleasant at one moment and angry the next;" that she believed she was being "abused, neglected and ill-treated by the physicians;" that she was "so disturbed, so fault finding and so troublesome" that he finally asked her relatives to take her away. After her discharge from the Middletown State Hospital she was in a private institution at Caldwell, New Jersey, for a short time, and on December 22, 1904, she was admitted to the Central Islip State Hospital for the Insane, where she died in July, 1911. She was absolutely demented during the last three or four years of her life, and died hopelessly insane. The cause of death was acute dilatation of the heart.

Such in outline is the sad history of this unfortunate wo-

man. There is no evidence in this case of undue influence, and there does not seem to be any foundation in fact, so far as appears from the testimony taken before me, for the allegation or suggestion that Barbara procured the making of the will by any trick or device. There is nothing in the record to show that Barbara was anything but a faithful and affectionate sister, and it would seem from the letters that the testatrix wrote to her while she was in the hospital at Middletown that Barbara was her favorite and the one upon whom the testatrix relied for advice and attention.

The only real question in this case is the question of mental capacity. The issue narrows down to whether at the very time of the execution of this will testatrix was possessed of testamentary capacity. What is testamentary capacity has been well settled by the courts of this state. The rule laid down in *Delafield v. Parish*, 25 N. Y. 29, has been quoted many times with approval by the courts of this state and is reiterated in *Matter of Lawrence*, 48 App. Div. 83, a case somewhat analogous to the present one. The definition is as follows: "It is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will." From this definition it is ap-

parent that a person may have sufficient testamentary capacity to make a valid will if the will be a simple one and yet not have sufficient capacity to make certain kinds of contracts. The sole question here is whether or not in the execution of her will Anna Maria Browning had sufficient mental capacity to remember the brothers, sisters and relatives who might be sufficiently near and dear to her to be expected to be the objects of her bounty; whether she could realize the fact that she owned an interest in a piece of real estate worth about \$8,000 and appreciate the value of that amount of money, and whether she could without prompting collect these ideas in her mind for a space of time long enough to enable her to form a rational judgment regarding them and make that judgment effective by the execution of a will, making an intelligent and deliberate disposition of that property.

Dr. Maurice Ashley, superintendent of the Middletown State Hospital for the Insane, whose eminent position as a specialist on nervous and mental disorders is unquestioned, and who had this woman under observation for about seven years, was a witness for the contestants. On cross-examination he testified that he thought the testatrix could have remembered the members of her family in October, 1897; that she could have remembered her family history; that she could have remembered the family relations that existed between the members of all her family; that she could have remembered that at one time they had been quite wealthy and that later they lost their money or a greater part of it. He further testified as follows: "Q. Do you think she would know if she made a last will and testament in which she gave the income for life to her two old aunts and the remainder of that property to her unmarried sisters, do you think she could distinguish and understand that at that time? A. Yes, I think she could understand it." Dr. Seward, who had charge of testatrix at "Interpines,"

where she was under treatment from the day after she made the will until January, 1908, was another one of contestants' experts and testified that testatrix had property delusions and delusions of persecution. He was asked: "Q. Did she ever state to you the amount of her property? A. No, not to my recollection." If testatrix had never told the doctor the real or imaginary amount of her property he could not be expected to know whether or not she had property delusions in this sense of the term. Regarding her condition when she was admitted to his institution, the day after the will was executed, the doctor testified as follows: "Q. Don't you know when she came there that she had very many rational moments? A. She had moments of apparent rationality when she was not actuated by her delusions. Q. And up to that time she had sufficient understanding and mind that she could know what she wanted to do with her property? A. Possibly so; I could not say. Q. Did she know the number of her relatives and their relationship to her. A. Yes. Q. And the nature and extent of her property? A. Yes." It is to be noted that there are in evidence several letters written by the testatrix to her sister Barbara from five to seven years after the will was executed and while she was confined in the State Hospital at Middletown, which indicate clearly that at the time of writing these letters the testatrix was perfectly rational. In these letters she referred to many of her relatives; to gifts that had been sent her; to her unfortunate situation; to many books she had read, and to many incidents that had occurred in the hospital. In these letters she mentions the two old aunts, and says that her father asked her to be good to them; she is particularly affectionate in her reference to her sister Barbara, and she deals with the wide range of subjects mentioned in the letters in an ordinary rational manner.

The contestants rely upon the proofs of the eccentric con-

duct of the decedent from the time that she was about eighteen years of age till she was sent away in 1897, at the age of about thirty-five years. It appears that during this period she was prone to exaggerate her bodily ailments; took more medicine than she really needed and consulted physicians when there was no necessity for it; spent a great deal of time in dressing; threatened homicide and suicide; went to a reception at one time in some old clothes; became easily excited and angry; was morose and melancholy at times, and did various other things that were characterized by the lay witnesses as irrational. These acts do not create any presumption as to her mental capacity in October, 1897, for she might have done all these things and yet have been perfectly competent to execute a valid will.

The occurrences immediately preceding and surrounding the execution of the will establish the fact very clearly to my mind that the testatrix knew what she was doing and was of sound and disposing mind and memory when she executed the will. She had given full and complete instructions to the lawyer several days before the will was executed. He has testified clearly and explicitly to his conversations with the testatrix at the time he received his instructions from her and when she executed the will. I think his testimony is to be believed, as is also that of Marie Lotze, the only living witness to the will. Their testimony negatives the contention that the testatrix was under any delusions when she made her will.

It is to be noted also that it was not until about ten years after the execution of the will that the mind of the decedent became hopelessly deranged. She had no organic disease of the brain, and consequently this is not one of that class of cases where a person at the time of making a will suffered from a progressive organic disease that did not make itself apparent until some time after the execution of the will.

It must not be overlooked that the will that is contested so strenuously by most of the relatives is, under the circumstances, a very natural will. The unmarried girls had been keeping up the home and supporting the two aunts who had brought them up. The other brothers and sisters had married and had their own homes. The provisions of the will itself show that it was not the result of a delusion. If testatrix had been under a delusion suggested by Barbara, or if the will were the result of undue influence, it seems to me that the provisions of the instrument would have been different. For Barbara would have seen to it that she would not have to wait until the termination of one or possibly two life estates to come into possession of the property, and the will would not have provided for a division of the remainder interest with the sister Jane if Jane remained unmarried, or with all the sisters in case both Barbara and Jane had married.

The will is very fair and just, and would indicate that the testatrix was guided by gratitude and common sense in the disposition of her property. In my opinion the evidence falls far short of proving that the testatrix was controlled by any delusion in the making of her last will and testament. I am satisfied that she was of sound and disposing mind and memory and not under restraint in the execution of the paper offered herein for probate.

The paper propounded as the last will and testament of Anna Maria Browning will be admitted to probate. Submit decision and decree and tax costs on notice.

Decreed accordingly.

**Matter of the Judicial Settlement of the Account, Etc., of
ELLY SMITH, as Administratrix of the Goods, Etc., of
LUCIUS HOPKINS SMITH, Deceased.**

(Surrogate's Court, New York County, May, 1913.)

**SURROGATES—DEPOSITIONS—SETTLEMENT OF INTERROGATORIES ANNEXED TO
LETTERS ROGATORY TO TAKE TESTIMONY—CODE CIV. PRO., § 913.**

While a surrogate upon the settlement of interrogatories to be annexed to letters rogatory to take testimony pursuant to section 913 of the Code of Civil Procedure must pass upon the pertinency of the interrogatories, all other objections must be reserved until the trial when the desposition is offered in evidence.

SETTLEMENT of interrogatories, to be annexed to letters rogatory to take the testimony of the Right Honorable Judge of the Royal District Court in Berlin, Prussia, pursuant to section 913, Code of Civil Procedure. The application for letters rogatory was contested. Matter of Smith, 79 Misc. Rep. 77.

Merrill & Rogers (Payson Merrill, of counsel), for Sidney A. Smith.

Martin J. Keogh, Jr., special guardian for Ruth Hopkins Smith, an infant.

Bernard Gordon, for the administratrix.

FOWLER, S.—In this matter two persons are claiming the one-half of the estate of the intestate which does not, under the Statute of Distributions, pass to the intestate's widow, who is the administratrix herein. The counterclaimants are

the brother of the intestate and Ruth Hopkins Smith, claiming to have been adopted in Germany by the intestate. If the German adoption is regular and valid, the adopted daughter will exclude the brother. The brother denies the validity and regularity of the adoption of Ruth Hopkins Smith, and letters rogatory have at his instance been directed to issue out of this court to take testimony of the very eminent judicial officer who in Germany sanctioned or authorized the adoption in question. The brother of intestate, who claims that such adoption in Germany was in some way illegal or irregular, now exhibits and propounds interrogatories for settlement. The adopted child insists upon the regularity of the adoption and exhibits and propounds cross-interrogatories. The administratrix, who is the mother of the infant, exhibits and propounds other cross-interrogatories to be administered to the judge in question. These interrogatories and cross-interrogatories are now presented for settlement to the surrogate, pursuant to section 892 of the Code of Civil Procedure. Many objections are taken and interposed to the various interrogatories and cross-interrogatories. The effect of section 892 on the power of the surrogate at this stage of the cause to disallow interrogatories pertinent to the issue is first much insisted on by counsel for the brother of intestate.

The history of commissions to take the testimony of witnesses not produced in court is brief and illuminating. The practice of taking depositions of witnesses, *probatio in perpetuam rei memoriam*, was long recognized in the canon law courts and in chancery, being taken over from the civil law. But it was not so in the common law courts. In trials at law all testimonial evidence must have been taken in court *viva voce* (1 Dunlap's N. Y. Supreme Ct. Practice, 541; Caine's Practice, 394), unless the parties consented in writing, or unless some statute intervened or equity supplemented the deficiency. At

common law the depositions taken in chancery *de bene esse*, if the witness was cross-examined or opportunity given for cross-examination, might, however, be read on the trial of an action at law under circumstances unnecessary to detail. Mr. Caine in his New York Practice of 1801, and Mr. Dunlap in his Work on the Practice of the Supreme Court of this State, published in 1821 (founded, if I remember aright, on the English treatise by Mr. Tidd), failed to notice that there was a mode of securing depositions in chancery for use in courts of law prior to the statute of 1789. Mr. Dunlap attributes our practice of commissions to take the testimony of witnesses wholly to the operation of the New York statutes, which I am about to notice. 1 Dunlap's Practice, 541. Yet, I may add, the old chancery books and old practice books fully disclose the equity practice I have mentioned, and generally they refer to the use of such depositions in the common law courts in proper cases. See Buller's Nisi Prius, 229, 239; Taylor Ev., § 543. But I need not pursue this point at this time.

Prior to the statute, to which I shall refer, the common law courts would generally coerce the parties, and stay the action at law unless the parties consented to a commission to take the testimony. The statute no doubt is the sole authority for commissions issued *in invitum* under the code or in actions at law. Such commissions when issued formerly stayed the actions automatically where there was an affidavit of merits, unless there was an unreasonable delay in going to trial, when a rule *nisi* to proceed, or for judgment even, might issue. I should remark in justice to Mr. Dunlap that it was unnecessary for him to refer to the chancery practice before 1789, as there was a statute soon passed in this state to perpetuate independently of chancery the testimony of witnesses in certain cases. 1 R. L. 445. I must notice in passing that there was a very early decision in this state, prior to the statute of 1789,

granting a commission in an action at law. *Conklin v. Hart*, Coleman's Rep. 69. But this decision was questioned by Mr. Caine in his Practice. The rules and practice of the early courts of New York prior to the present state government are still most important at times. It is much to be regretted that the excellent decisions of our colonial courts were never published in this state, as were the decisions in the colonial courts of Virginia and Massachusetts. The New York decisions, many of great weight, reach back to 1691 at law, and 1684 in chancery, and such a publication would throw much light on certain practice questions as well as on certain local deviations from common law rules, both substantive and adjective. These deviations have often great importance on the later substantive and adjective law of this ancient and great state. If we remember that the judicial establishment of this state antedates the whole modern law of England, and even the completion of the English canon of equity, the juridical importance of early doctrines and of our domestic decisions must be obvious to every lawyer.

The first New York statute which I have found relative to commissions to take the depositions of witnesses residing out of this state is the "Act for the Further Amendment of the Law." Laws of 1789, chap. 28, § 4; 1 J. & V. 437. It was applicable to proceedings in all courts of the state. The old reports of New York are full of cases on this statute, re-enacted in 1801 (1 K. & R. 351, § 14), and again in 1813 (1 R. L. 519, § 11). It was this last act which was revised in the Revised Statutes of 1830. 1 R. S. 394, §§ 11, 16. From the Revised Statutes, with some few changes, the legislation was next transferred to the Code of Civil Procedure, where it now is. Thus it is apparent that our present practice proceeds from the statute of 1789, and possibly from a date even earlier. From the general course of legislation in this state we might suspect

that the act of 1789 was in turn founded on an earlier colonial statute, or else on an English statute enacted posterior to the reign of Charles II. But I have not had time to pursue the history of this particular legislation further back than the year 1789; nor is it necessary that I should. The point here is, that if the procedure on commissions to take testimony is wholly statutory in this state, it must be followed closely, or the depositions, taken under the act, are imperilled by any departure. This fact gives rise to the apparent anxiety of the several parties to this important controversy.

It was under the old acts of this state, after 1789, the custom of counsel to stipulate in writing that all questions as to the competency or materiality of the evidence taken by commissioners on interrogatories should be reserved for the trial. Formerly the leading *nisi prius* lawyers always apparently took this course prior to the Revised Statutes of 1830. This was due to what lawyers then called the "urbanity of the profession." See Caine's Practice, 431. In the absence of such written stipulation the weight of authority then was that the proper place to object to the form of the question or interrogatory or to relevancy, materiality or competency, of the evidence sought was on the trial, when the commission was returned and the deposition allowed to be read in evidence. But in the year 1826, in *Francis v. Ocean Ins. Co.*, 6 Cow, 404, the Supreme Court gave a construction to the statute which was, to say the least, disturbing. In that case it was held that after formal allowance of the interrogatories certain objections came too late. This ruling gave rise to a new and stricter practice on the settlement of interrogatories, and then the difficulty was that the court might prematurely exclude pertinent evidence. This latest difficulty caused the revisers of the Revised Statutes to make it mandatory on the court to allow on the settlement any question pertinent to the cause. I R. S. 394,

§ 15. See revisers' note to same. Prior to the Revised Statutes all objections to the interrogatories might be taken at the trial after return of the commission. The interrogatory was first read on the trial and then all objections noted and passed on as in the case of *viva voce* testimony. Under the Revised Statutes all objections to the deposition, except pertinency, might be raised as before the Revised Statutes when the deposition came to be read in evidence. *Williams v. Eldridge*, 1 Hill, 249; *Walton v. Godwin*, 54 Hun, 387; *Wilcox v. Dodge*, 17 Civ. Pro. 248, 253; *Wanamaker v. Megraw*, 168 N. Y. 125. The Code has not changed this rule.

That since the Revised Statutes pertinent questions must now be allowed by a judge on the settlement of the interrogatories there is no room for doubt. See Code Civ. Pro. § 892; *Wanamaker v. Megraw*, 168 N. Y. 125, 131; *Wilcox v. Dodge*, 17 Civ. Pro. 248; *Uline v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 175; *Walton v. Godwin*, 54 Hun, 387; *Hemenway v. Knudson*, 50 N. Y. St. Repr. 738. The statutory direction to this effect gave rise to a minor rule: That it is now error on the settlement to allow interrogatories which are not pertinent has lately been affirmed by the Appellate Division of the First Department (Jan., 1913) in *Tegio v. Robinson*, as is apparent to me from the manuscript copy of the opinion with which I am favored. The same thing was held in *Walton v. Godwin*, 54 Hun, 387, except that the ruling extended to relevant questions. *Dent v. Society of Friars*, 41 N. Y. St. Repr. 472. Consequently I must not allow on the settlement interrogatories which are plainly directed to eliciting testimony which is not pertinent, or, as said in *Walton v. Godwin* and *Dent v. Society of Friars*, which is not relevant to the issues. Thus "pertinent" and "relative" interrogatories are now placed in the same class, and on the settlement of the interrogatories the pertinency and the relevancy of interrogatories must be passed

on by me, provided the parties insist. That pertinency and relevancy are the same thing I should have thought doubtful had it not been for the decision referred to; but this consideration is no longer open to the surrogate in view of the decision mentioned. But I am inclined to think that the term relevancy, in the decision mentioned, is used as the equivalent of pertinency and was not intended to extend the operation of the Revised Statutes.

That the surrogate's ruling on the settlement of the interrogatories, as to their pertinency, is final, and may not be reversed on the trial by the trial judge I deny. The conduct of a trial at law is left, by the common law, to the trial judge, and no interference with his constitutional functions and duties in respect of the evidence adduced on the trial can be tolerated, at least by mere implication. The Code itself seems explicit on this point. Code Civ. Pro. § 911. But were it not for that provision, also taken out of the Revised Statutes, the rule on this head must have been the same by the common law.

That all other objections to the interrogatories except pertinency (and perhaps relevancy equivalent to pertinency) may and should be reserved for the trial seems to me clear. This has long been the practice of this court, and there is very good reason for continuing the practice and for reserving all other objections until the trial. The trial is the best time and place for passing on the testimonial evidence offered. Code Civ. Pro., § 911; *Wilcox v. Dodge*, 17 Civ. Pro. 253; *Walton v. Godwin*, 54 Hun, 387. And see the brief of Mr. Parker, of counsel, 79 N. Y. 178; *Wanamaker v. Megraw*, 168 id. 125, 131; *Cudlip v. N. Y. Evening Journal Pub. Co.*, 180 id. 85, 87; *Clifford v. Denver & R. G. R. Co.*, 111 App. Div. 513, 516. The only possible objection to be urged against this cause is that some ruling on the evidence may occasion surprise to some party to the cause. This consequence can be obviated by an applica-

tion for a further commission according to the former practice in equity. As there is no jury in this court, and the court is always open by law, no great delay need ensue in an important cause.

After this review of the practice and statutory requirements in respect of testimonial evidence taken by commission for use on the trial of an issue of fact, I shall now proceed to consider the objections interposed to the interrogatories to be annexed to the letters rogatory to be issued out of this court. The single issue for trial in this cause is the status of the infant claiming to be the adopted daughter of the intestate. Was or was not her adoption in Germany valid, effective and complete? The interrogatories and cross-interrogatories are to be put to the German judge whose court sanctioned the adoption mentioned. That any of the proposed interrogatories or cross-interrogatories are not pertinent to the issue is not apparent to me, and that is all which I shall consider at this time. It may be that some of the evidence sought may not be competent or material when elicited, or even that some of the questions may not be competent, but all such matters should be reserved for the trial when the evidence comes to be offered and the interrogatories are sought to be read in evidence.

The issue to be determined here is very subtle and novel, and the result of the trial will be of great consequence to the brother of intestate and to the infant. I am not inclined, at this stage of this controversy, to exclude any interrogatory which is or may be even remotely pertinent to the issue if it is put by interested parties. The witness to be examined is a juriscounsel and foreign judge of distinction. He is sought to be interrogated concerning a solemn judicial act of his own, taken pursuant to the law of Prussia. This act was, and is, of grave consequence to citizens of this state. What course the learned judge will take or what he may say on his oath when he is ex-

amined I cannot foresee. But that the interrogatories and cross-interrogatories exhibited, if they relate at all to his judicial action in the premises, are "pertinent" I cannot doubt. All the interrogatories and cross-interrogatories exhibited on the part of the infant or the brother of intestate are pertinent to the issue and should be and are allowed on that score, but with full right reserved to them, or either of them, to take on the trial or after the return of the commission any and all such objections to interrogatories, cross-interrogatories or answers thereto, or any of them, as they or either of them may then see fit or deem proper.

The cross-interrogatories propounded and exhibited on the part of the mother by nature of the infant herein occupy another very distinct position. The mother of the infant, now Mrs. Elly Smith, happens to be also the administratrix herein. As such administratrix she will be protected by the decree of this court whether distribution be decreed to her own child or to the brother of intestate. As administratrix she has no legal interest in the contention between her child and intestate's brother over the distributive share claimed by either. Her maternal solicitude for her child is not a legal interest in the controversy. The position of the administratrix in respect to the real issue for trial here is passive, and she has no legal right to make herself an actor in that controversy further than to see to the jurisdiction of this court. Her child, alleged by its guardian to have been adopted by the intestate after his marriage to the lady now the administratrix is, as I am informed, her daughter by her former divorced husband, one Mr. Bleisener. If Mrs. Smith could intervene in this particular controversy between her child and the brother of intestate simply because she is the mother, so could the child's father by nature. There is no more propriety in this administratrix furthering the legal controversy between her child and the intestate's brother than

there would be in her former husband's so doing. The objections to the cross-interrogatories propounded and exhibited on the part of the administratrix are sustained and such cross-interrogatories are disallowed.

In view of my last ruling, the guardian of the infant may have leave, within ten days after the promulgation of this opinion, to adopt any or all of the cross-interrogatories exhibited on the part of the mother, except the cross-interrogatory numbered 5, and those which are repetitions. Surprise or misadventure to any one concerned in this cause will thus be obviated, and at the same time we shall better preserve the proprieties usual, I hope, in judicial proceedings in this court.

Proceed accordingly.

Matter of the Judicial Settlement of the Estate of SARAH M. GRAY, Deceased.

(Surrogate's Court, Rensselaer County, May, 1913.)

WILLS—BEQUEST OF PART OF RESIDUARY ESTATE—BEQUESTS TO UNINCORPORATED ASSOCIATIONS OR SOCIETIES—RESIDUARY ESTATE AS UNDISPOSED OF TO PASS AS IN CASE OF INTESTACY.

A bequest of one-third of a residuary estate to the treasurer, for the time being, of the "Womans Presbyterian Synodical Board in Aid of Foreign Missions of the Synod of Albany" which never was incorporated and went out of existence shortly before the will was executed, is invalid, as is also a bequest of one-third of said residuary estate to the treasurer, for the time being, of the "Womans Presbyterian Synodical Board in aid of Home Missions of the Synod of Albany" also not incorporated.

The said two-thirds of said residuary estate will be decreed as undisposed of and pass as in case of intestacy.

PROCEEDING upon the judicial settlement of the account of administrators with the will annexed.

Scott & Tiffany, for administrators with the will annexed.

Frederick W. Cameron, for Women's Board of Foreign Missions of the Presbyterian Church and the Women's Board of Home Missions of the Presbyterian Church of the United States et al.

William J. Roche, for next of kin.

HEATON, S.—Upon this judicial settlement it becomes necessary to determine whether two legacies, each being of one-third of the residuary estate, are valid. The will was made in 1886 and the testatrix died in 1908. One legacy is given to the "Treasurer for the time being of the Womans Presbyterian Synodical Board in Aid of Foreign Missions of the Synod of Albany" and is claimed by the Women's Board of Foreign Missions of the Presbyterian Church in the United States of America. The names of the legatee and of the claimant are so dissimilar that it cannot be claimed that the testatrix had the claimant in mind and intended to name it as the legatee when she drew her will. The conclusion that she did not refer to the claimant by that name is strengthened by the proof that some years prior to the making of the will, which was in 1886, there existed in Albany, a city adjoining the county in which testatrix lived, an unincorporated society known as the "Women's Presbyterian Board of Foreign Missions of the Synod of Albany." This name is so similar to the one used in the will that perhaps it might be declared to be the legatee if it were not for the fact that it never was incorporated and went out of existence shortly before the will was made. About that time, in

1884, the Synod of New York was incorporated and the Albany Synod became a Presbyterian affiliated with the New York Synod. The Synodical Society then became a Presbyterian Society under the name of the Women's Foreign Missionary Society of the Presbytery of Albany, which is also an unincorporated society, and therefore not capable of taking a bequest. *Mount v. Tuttle*, 183 N. Y. 358.

The claimant urges that as these unincorporated societies have been shown to be branches and auxiliaries of the Women's Board of Foreign Missions of the Presbyterian Church of the United States of America (incorporated) that society can be awarded the legacy. This can hardly be so in view of the lack of proof either in the will or outside of it that the testatrix intended her gifts to go to that society, and because the evidence is that these unincorporated societies were not engaged in the work or any part of the work of conducting and carrying on foreign missions as such, but their objects were to create and stimulate interest in foreign missions and to collect such money as they could in the interest of the cause. They had their own organization, their own resources and their own expenses.

Suppose for the purpose of a clearer understanding of the situation that there was now and at the time the will was made a local unincorporated society of the exact name used in the will, and that society appeared as a claimant of the legacy. The law of this state would prohibit this court from decreeing payment to such voluntary unincorporated society. If then the National Society, the claimant, stepped in and demanded payment to it, because the local society was, as between themselves, a branch or auxiliary of it as to that particular part of its work of interesting the congregations of the various churches in missionary work and obtaining systematic contributions to the cause, it would be clear that the National So-

ciety would have no claim to the fund. The condition which actually exists is no more favorable to the claimant than the supposed condition would be.

It is apparent, therefore, that the gift to the local branch, which is incompetent to take, cannot be construed to be to another and different society having other functions and conducting in general a different work. The expression used, namely, "to the treasurer for the time being" does not constitute a gift to such treasurer individually, nor make him a trustee. The treasurer does not claim the legacy and it nowhere appears that it was the intention of the testatrix to make the legacy personal to the treasurer. Neither was a trust in the treasurer intended and none could lawfully be created for the benefit of an unincorporated society. The words "in aid of foreign missions" do not imply a trust since it has been shown that they are or were used in many of the names of the societies of the Presbyterian church. There was, therefore, no personal bequest or the creation of a trust, and there being no trust created the legacy is not saved by chapter 701, Laws of 1893 and amendments. *Murray v. Miller*, 178 N. Y. 316; *Matter of Durand*, 194 N. Y. 477.

The other legacy in question was given to the treasurer for the time being of the "Womans Presbyterian Synodical Board in Aid of Home Missions of the Synod of Albany," and is claimed by the Women's Board of Home Missions of the Presbyterian Church of the United States of America.

What has been said regarding the legacy to the Foreign Missionary Society applies to this legacy to the Home Missionary Society. In addition the fact that the claimant is not incorporated would seem, of itself, to prevent this court from directing payment to it.

Attention has been called to the act of 1884, chapter 340, incorporating the Synod of New York which combined or

merged the Synod of Albany and other small synods into a larger synod. This act provided that the property of the several synods and presbyteries which were continued or merged in the Synod of New York should vest in the New York Synod. While this act might affect the transfer of property already in possession of the several synods and presbyteries thus united in the larger synod, it could not affect these legacies given, not to the synod or presbytery, but to voluntary societies existing within their territory.

While this court will always endeavor to carry out the wishes of a testator, yet there may be cases where the means to be employed are not recognized by the law of the state as being good public policy, and thus the good of all must be considered as being of more importance to the community than the carrying out of a particular intention. The law considers it bad public policy that testators should be allowed to make bequests to an association of individuals having no legal or continuous existence, which might be dissolved or abandoned at any time, thus leaving the property so accumulated to be appropriated or misappropriated at the will of those having it in possession.

It will be decreed that two-thirds of the residuary estate is undisposed of and go by the intestate law to the next of kin of the testatrix.

Decreed accordingly.

Matter of Awarding Letters of Administration upon the Estate
of ANNA TATOR, Deceased.

(Surrogate's Court, Columbia County, May, 1913.)

**EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF RELATIVES OF THE
WHOLE BLOOD TO BE PREFERRED TO THOSE OF THE HALF BLOOD—
STATUTORY PRIORITY IN GRANT OF LETTERS OF ADMINISTRATION.**

The provision of section 2660 of the Code of Civil Procedure, that in the appointment of administrators relatives of the whole blood shall be preferred to those of the half blood, is broad enough to include consins.

A cousin of decedent, whose father and mother were respectively brother and sister to decedent's father and mother, has no statutory priority in the grant of letters of administration over another cousin where the relationship of both to decedent proceeds from the same ancestors, to-wit, grandparents.

Two applications were made to the Surrogate's Court in the above matter, one by Jeremiah Tator, a cousin of decedent, asking that letters be issued to him; and another by Everett Ostrander, another cousin of decedent, asking that letters be issued to him. Citations in both matters were returnable at the same time and heard together.

L. Royce Tilden, for petitioner Jeremiah Tator.

Crandell & Graf, for petitioner Everett Ostrander.

COFFIN S.—The petitioner Jeremiah Tator, a cousin of decedent, asks to be appointed administrator, and claims that because his father and mother were brother and sister respectively to decedent's father and mother he is a relative of the whole blood and, therefore, has priority over the other petitioner,

another cousin, Everett Ostrander, who is said to be a relative of the half blood.

The definition of "whole blood" and "half blood" as given in the various dictionaries is somewhat vague, and almost invariably cites as examples, brothers and sisters having, or not having, as the case may be, the same father and mother. But the language of the Code (§ 2660), preferring *relatives* of the whole blood to relatives of the half blood, is broad enough to include cousins.

It is easy enough to define brothers and sisters of the whole and half blood. But is a cousin whose father and mother were brother and sister respectively to another cousin's father and mother, a cousin of the whole blood? And are cousins not so doubly related cousins of the half blood? This double relationship is the rare exception, yet that fact is not sufficient, if such double relationship constitutes "whole blood," to warrant the court in disregarding the mandatory language of the statute.

If we go back to Blackstone's Commentaries we shall find the solution of the problem, and then the definitions found in later works lose their vagueness. In volume 1, page 194, Blackstone's Commentaries (12th London Edition) we find this clear language: "But herein there is no objection (as in the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood; that is, where the relationship proceeds not from the same *couple* of ancestors (which constitutes a kinsman of the *whole* blood) but from a *single* ancestor only; as when two persons are derived from the same father, and not from the same mother, or *vice versa*."

Assume that A had two wives, No. 1 and No. 2, and two sons A1 and A2 by the first wife, and two sons B1 and B2 by the second wife: the sons A1 and A2 would be brothers of the whole blood to each other, but brothers of the half blood to the sons B1 and B2. If A1 and A2 had each a son, A3 and A4 respec-

tively, and B1 and B2 had each a son B3 and B4 respectively, then A3 would be a cousin by the whole blood to A4; and likewise B3 a cousin of the whole blood to B4; but A3 and A4 would be cousins of the half blood to B3 and B4.

So the true test, in the case of cousins, for instance, is to go back to the same couple of ancestors (grandparents), and if all the cousins proceed from the same *couple*—the same grandfather and grandmother—they are cousins of the whole blood; if, on the contrary, they proceed from the same grandfather but from different grandmothers, they are cousins of the half blood.

If we apply this test we shall see that the two petitioners' relationship to decedent proceeds from the same *couple* of ancestors, to-wit, grandparents, and they are both of the whole blood.

We must therefore hold that the petitioner Jeremiah Tator has no statutory priority over the other petitioner.

Letters may issue to the two petitions.

Decreed accordingly.

**Matter of the Appraisal of the Estate of JULIA DE WINDT
HOOK THOMPSON, Deceased, Under the Acts in Relation to
the Taxable Transfers of Property.**

(Surrogate's Court, Dutchess County, May, 1913.)

**TAXES—TRANSFER TAX—CONVEYANCE OF REAL ESTATE BY HUSBAND AND
WIFE—PURCHASE MONEY MORTGAGE.**

Where, upon the conveyance of real estate by husband and wife as tenants by the entirety, a purchase money mortgage was taken in their joint names, and a cash payment made to them by a check payable to them jointly was deposited in a trust company in the

wife's name solely for the purpose of being reinvested in real estate in the same manner as that which had been conveyed as testified to by the surviving husband, he, upon the wife's death, became entitled to the sole possession of one-half of the mortgage, and one-half of the amount of the check, and the remaining one-half of said two funds passed into the wife's estate and was subject to a transfer tax.

APPEAL from an order assessing the transfer tax.

Frank Hasbrouck, for executors.

John J. Mylod, for state comptroller.

HOPKINS, S.—This is an appeal from an order assessing the transfer tax upon the estate of the above named decedent, based upon the report of the appraiser.

He reported that one-half of a bond and mortgage given by one Eugene H. Pool to von Beverhout Thompson and Julia de Windt Thompson, his wife, upon which there was due at the date of the death, July 6, 1912, of said Julia de Windt Thompson for principal and interest, the sum of \$30,383.33, was taxable, and also that one-half of a deposit of \$12,889.71, in the Union Trust Company of New York, standing in the name of Julia de Windt Thompson at the time of her death, was taxable.

The appellant claims that both of the above items should be stricken out, and exempted from taxation for the reason that both amounts were the proceeds of real estate owned by von Beverhout Thompson, and his wife, as tenants by the entirety, and, in case of the death of either, the survivor became the owner of the whole, and that the said mortgage and money retained the same character by agreement of the parties. Such claim is based upon the fact that certain real estate owned by them in the city of New York, as tenants by the entirety,

was sold and conveyed, and a purchase money mortgage for \$30,000 taken in their joint names, and a cash payment of \$12,750 of the purchase price deposited in the Union Trust Company in decedent's name, solely for the purpose of being re-invested in real estate in the same manner as they held that which they sold.

All the testimony in this matter is in the form of affidavits, filed with the appraiser, and it appears that the only testimony to support the agreement claimed to have been made between Dr. Thompson and his wife was given solely by Dr. Thompson, without corroboration, and in his own interest, and having the effect of defeating the assessment of any tax upon the property in question, and it seems to me that, although his testimony is absolutely true, it is improper and inadmissible in view of his interest in the estate and should not have been received. To accept the sole testimony of a witness directly interested in the result in proceedings of this character would absolutely nullify the transfer tax law, and open the door for the prevention of the imposition of any tax in all similar cases. Such evidence would be inadmissible in any court, against the estate of a deceased person, relative to any agreement, transaction or understanding between the witness and such deceased person, affecting the disposition of the estate or the interest of the witness therein, and such rule should be applied in proceedings of this kind.

The transfer tax law and the decisions thereunder are fully discussed in Matter of Durfee, 79 Misc. Rep. 655, and I fully concur with the conclusions in that case, and it would be needless for me to enlarge upon the questions there determined.

When Dr. Thompson and his wife, being tenants by the entirety, conveyed the New York real estate, and accepted part cash and a purchase money mortgage for the balance, made payable to both, the tenancy by the entirety was ended, and

he, as survivor, was not entitled to the whole proceeds on her death, without legal evidence of agreement or gift. *Matter of Baum*, 121 App. Div. 496; *Matter of Albrecht*, 136 N. Y. 91.

As there is no evidence such as the law and established rules of practice require of either agreement or gift, it follows that, upon the death of Mrs. Thompson, Dr. Thompson, her husband, became entitled to the sole possession of one-half of the mortgage above mentioned, and it appearing from the testimony of the witness Taylor that the \$12,750 was money received from the sale of said real estate and was paid to Dr. Thompson and his wife by check made in their joint names, he, upon her death, became entitled to the possession of one-half thereof, the remaining half of said two funds passing into the estate of said decedent as personal property, subject to taxation under the provisions of the taxable transfer act; therefore the determination of the appraiser was correct, and must be affirmed. Let an order to that effect be entered.

Order affirmed.

Matter of the Judicial Settlement of the Accounts of HENRY R. C. WATSON, as Sole Surviving Executor and Trustee Under the Last Will and Testament of WILLIAM WATSON, Deceased.

(Surrogate's Court, Westchester County, May, 1913.)

WILLS—RESIDUARY ESTATE TO EXECUTORS AND ADMINISTRATORS, IN TRUST, TO SELL AND DISPOSE OF SAME AND TO DIVIDE THE PROCEEDS—DUTY OF TRUSTEES TO OBEY DIRECTION "TO INVEST EACH SHARE SEPARATELY" IN TRUST—ACCOUNTING BY TRUSTEES—EXECUTORS AND ADMINISTRATORS.

Testator gave his residuary estate to his executors and trustees, in trust, to sell and dispose of the same and to divide the proceeds

into as many equal shares as he should leave him children surviving. The trustees were to invest each share separately and apply the income to the use of the son or daughter for whom it was set aside. Each daughter was to have a life use of such share and the principal was to be paid over upon her death to her children or to her appointees by will. Each son was to receive one-half of the principal of his one-ninth share when he became twenty-five years of age and, by the codicil to the will, the other one-half of his share he was to have a life use of, the same to be paid over to his children or his appointees under his will at his death.

By a later clause permission was given to the trustees to make certain advances to the sons which in their discretion they deemed necessary. Such advances, however, were limited to an amount "to which they will probably or possibly be entitled to under the provisions of the will." Such advances to any one son, however, not to exceed "one-half the amount that such son will probably or possibly be entitled to," but in the event that such advances or shares shall not ultimately go to such son, "no personal claim shall be made against such son, or his estate, for the repayment of such advances."

Held, that testator intended the principal of his estate should be divided into nine equal parts and both principal and income paid over as directed by the will, and upon the judicial settlement of the accounts of the sole surviving executor and trustee the executors of one of testator's sons are entitled to whatever there is left in the one-ninth fund which was to be set apart for their testator, including principal and income; that the trustees in estimating and advancing a certain sum to said son merely carried out the provisions of their testator's will and that no interest should be charged by them on the amounts so advanced.

It was the duty of the trustees to have obeyed the direction of the will "to invest each share separately" in trust for the nine children of their testator as provided and such division should have been made at the commencement of the accounting period herein.

In order that the trust funds may be accurately administered the decree herein should provide that the trustees forthwith divide the estate, in so far as the same is capable of subdivision, into separate trusts as directed by the will.

The executors of the deceased son of testator being now entitled under the will to all of the one-ninth share, except such portion as has been conveyed or assigned by them, may make any agreement with the trustees they see fit as to such share.

PROCEEDINGS upon the judicial settlement of the accounts of a sole surviving executor and trustee.

Decker, Allen & Storm, for petitioner.

Edw. W. Davidson, for executors of Estate of William Watson, the younger, deceased.

Jerome A. Peck, special guardian.

SAWYER, S.—William Watson died September 28, 1877, leaving a last will and testament, which was admitted to probate in the office of the surrogate of Westchester county.

By the ninth clause of his will the testator disposed of all his residuary estate. Said ninth clause is as follows:

“ I give, devise and bequeath all the rest, residue and remainder of my estate, real as well as personal, including said farm, stock, cattle, horses, personal property and utensils, and the said house and premises number Fifty one East Thirty-fourth Street (subject to the life estate of my wife, as aforesaid) to my executors and trustees, and to the survivors and survivor of them, in trust, nevertheless, and to and for and upon the following uses, intents and purposes, and with the following powers of and concerning the same, that is to say; to sell and dispose of the same at public or private sale, for cash or upon credit, and convert the same into money and to execute and deliver good and sufficient conveyances and transfers of the same, so as to vest good title in the purchaser or purchasers thereof, and to divide the proceeds into as many equal shares as I shall leave children surviving me, and in case any of my children shall have died before me, leaving issue living at the time of my death, then the said number of shares shall be increased so as to include one equal share for each of such

deceased children, and I give, devise and bequeath all of said equal share of the proceeds of my said residuary estate to my said executrix, executors and trustees, and to the survivors and survivor of them, in trust, nevertheless, and to and for and upon the following uses, intents and purposes and with the following powers of and concerning the same, that is to say, to invest each equal share separately in the same manner as hereinbefore directed, and to apply the rents, income and profits of the respective shares allotted to my daughters (surviving me) that is, one equal share for the benefit of each daughter, as follows: to the use of each daughter during her natural life, the rents, income and profits of her one equal share for her sole and separate use free from the debts, control and engagements of any husband she may at any time have, in the same manner and with the like effect as if she were a feme sole, and upon her death to divide, distribute and pay over the principal of her share (and I so give, devise and bequeath the same) to her children living at the time of her death and to the issue, then living, of any of her children then dead, to be equally divided between them, such issue to stand in the place of his, her or their parent; and in default of such children or issue, then to such person or persons and in such manner and form as she by any instrument in writing in the nature of a will or appointment executed under her hand in the presence of two witnesses notwithstanding her coverture, shall limit, direct or appoint, and in default of such limitation, direction or appointment then to my next of kin under the laws of the state of New York as if I had died intestate.

“And also to apply the rents, income and profits of the respective shares allotted, as aforesaid, to my sons surviving me, that is one equal share for the benefit of each son, as follows: to the use of each son the rents, income and profits of his one equal share until he shall attain the age of

twenty-five years, or sooner die, and upon attaining that age, or if he shall have attained it before my death, to pay, transfer and deliver over (and I so give, devise and bequeath) to him one-half of the principal of his one equal share, and to apply the rents, income and profits of the remaining half of his one equal share to his use until he shall attain the age of thirty-five years, or sooner die, and upon his attaining said age of thirty-five years to pay, transfer and deliver over (and I so give, devise and bequeath) to him the said remaining half of the principal of his one equal share, and in the event of his death before he would be entitled, as aforesaid, to the payment of the half or the whole of the principal of his one equal share, then to pay, transfer and set over (and I so give, devise and bequeath) the principal of his one equal share or so much thereof as may not have been paid to him, as hereinafter provided for, to his children living at the time of his death and to the issue then living of any of his children then dead, to be equally divided between them, such issue to stand in the place of his, her or their parent, and in default of such children or issue, then to such person or persons and in such manner or form as he shall by his last will and testament execute after he shall attain the age of twenty-one years, limit or direct, and in default of such limitation or direction then to my next of kin under the laws of the State of New York as if I had died intestate.

“ And also to apply the rents, income and profits of the respective remaining equal shares (if any) allotted, as aforesaid, to the issue (if any living at my death) of any of my children then dead, as follows: to the use of each class of issue equally the rents, income and profits of the share allotted to that class until the youngest of such class of issue living at my death shall attain the age of twenty-one years or sooner die, and upon such youngest issue attaining the age of twenty-one years or sooner dying, to pay, transfer and set over (and I so give, devise and

bequeath) the principal of the share of such class to and among said last mentioned issue equally, and to their heirs, executors, administrators and assigns.

“I feel a desire, not obligatory however, that my children, in case their pecuniary circumstances will warrant it, should reside upon portions of my said farm having dwellings thereon, or having building sites upon which they can erect buildings, therefore, in case my children respectively or any or either of them, shall elect, in writing, that portions or portion of my said farm shall form the whole or a part of their said respective shares or share in my estate at the fair value of such portions or portion to be fixed by my trustees and executors, the survivors or survivor of them, I authorize the latter to set the same apart by an instrument in writing to be executed, acknowledged and recorded to the intent that the portion so set apart for each one shall represent a whole or a part (as the case may be) of his or her share and shall be held accordingly, subject to the aforesaid life estate of my wife therein, and subject to the trusts, uses and powers respecting the said share as herein contained should the portion so selected, in any case, exceed in value (to be fixed as aforesaid) the amount of such child's share in my estate, the excess shall be paid or satisfactorily secured by such child to my estate; and in apportioning my farm to meet the election of my children the preference of choice shall be given first to my sons commencing with the eldest and so on successively down to the youngest, and then commencing with the eldest daughter and so on successively down to the youngest daughter.

“I expressly declare that the direction, hereinbefore contained, to sell my said house and premises on Thirty-fourth street, and my farm, stock, cattle, horses, personal property and utensils, subject to the life estate of my wife, and the direction hereinafter contained, to sell my other real estate is not

intended to control the executors and trustees as to the time when they shall make such sale, and they are authorized, in their discretion, to defer such sale to any time during the life of my wife, and it is my judgment, although not obligatory, that all sales of my real esate be deferred during the life of my wife in order to gain an increase of value."

By the eleventh clause of his will the testator empowered his trustees to make certain advances to his sons in *addition* to the provisions as set forth in the ninth clause of said will. Said eleventh clause is as follows:

"*Eleventh.* Inasmuch as it may be desirable to aid and assist my sons or some one of them in business I authorize and empower my executrix and executors, and the survivors and survivor of them, in their, his or her discretion should they, he or she deem it desirable for the interest and welfare of my sons or some one of them so to do, to advance from time to time to my sons respectively out of their respective shares to which they will probably or possibly be entitled under the provisions of this will, a sum or sums not exceeding to any one son one-half of the amount that such son will probably or possibly be entitled to, as aforesaid, and in the event that such shares shall not ultimately go to such son, no personal claim shall be made against such son, or his estate, for the repayment of such advances."

By the fifth clause of the codicil to the will the testator specifically revokes a portion and also modifies a portion of the provisions of the ninth clause of his will.

The fifth clause of the codicil is as follows:

"*Fifth.* In and by the ninth clause or article of my said will I directed my executors and trustees and the survivors and survivor of them, to pay, transfer and deliver over and I so gave, devised and bequeathed to my sons respectively, upon their respectively attaining the age of thirty-five years the re-

maining one-half of the principal of the respective shares of my residuary estate allotted to my sons respectively, and made provision for the disposition of the said remaining half of the said principal in the event that either or any of my sons shall not attain the said age of thirty-five years as will more fully appear by reference to the said ninth clause or article. Now, I revoke the said directions, gifts, devises and bequests in respect to the said remaining half of the principal of the said respective shares of my residuary estate so allotted to my sons as aforesaid and direct my executrix, executors and trustees and the survivors and survivor of them to apply the rents, income and profits of the said remaining half of each of said shares of my residuary estate to the use of the son to whom, or for whose benefit the share is allotted, as aforesaid, during the term of his natural life and upon his death to pay the principal of the said remaining half of the said share to his children living at the time of his death and to the issue, if any, then living of any of his children then dead, to be equally divided between them, such issue to stand in the place of the parent, and in default of such children or issue then to such person or persons and in such manner or form as he (my son) shall by his last will and testament, duly executed after the age of twenty-one years, limit or direct and in default of such limitation or direction then to my next of kin under the laws of the state of New York, as if I had died intestate, and I hereby revoke so much of the ninth clause or article in respect to the remaining half of the principal of the said shares, respectively, so allotted to my sons as is inconsistent with, or in conflict with this fifth clause or article of this codicil."

By the ninth clause of his will he gave his residuary estate to his executors and trustees, in trust, to sell and dispose of the same and to divide the proceeds into as many equal shares as he should leave him children surviving. The trustees were to in-

vest each share separately and apply the income to the use of the son or daughter for whom it was set aside. Each daughter was to have a life use of such share and the principal was to be paid over upon her death to her children or to her appointees by will. Each son was to receive one-half of the principal of his one-ninth share when he became twenty-five years of age and, by the codicil to the will, the other one-half of his share he was to have a life use of, the same to be paid over to his children or his appointees under his will at his death.

By the eleventh clause of the will permission is given to the trustees to make certain advances to the sons which in their discretion they may deem necessary. Such advances, however, are limited to an amount "to which they will probably or possibly be entitled to under the provisions of the will." Such advances to any one son, however, not to exceed "one-half the amount that such son will probably or possibly be entitled to," but in the event that such advances or shares shall not ultimately go to such son, "no personal claim shall be made against such son, or his estate, for the repayment of such advances."

The testator left nine children—four sons and five daughters. He also left a widow who died in 1894, and that portion of the property of which she was left a life use is now a part of the residuary estate.

The parties contesting this accounting are the executors of William Watson, the younger. As such executors they are entitled to whatever there is left in the one-ninth fund which was to be set apart for William Watson, the younger, including principal and income.

Each of the four sons has been paid about \$130,000 out of the principal as and for the one-half of the one-ninth share of said estate devised and bequeathed to him by said testator. See former decrees in this estate.

Manifestly under the terms of the will, William Watson, the

younger, when he became twenty-five years of age, was entitled to receive immediately one-half of the one-ninth or one-eighteenth of his share of the residuary estate, as an absolute matter of right. The payment of \$130,000 was made to said son as the approximate amount of said one-eighteenth share. Whether such payment was in excess of the sum he was entitled to as such share or not is a mere question of computation, but, assuming that it was in excess of such one-eighteenth share, then the trustees could, if they deemed it advisable, advance any portion of the one-ninth of said share to which William or his estate might be ultimately entitled to pursuant to the provisions of the eleventh clause of the will.

If the eleventh clause of the will means anything it must mean what it says, namely, that the trustees are given the right to estimate the amount of the estate and advance to each son what they may deem advisable "out of the share to which he may ultimately be entitled to." This the trustees have done. They estimated the value of the estate and paid over to each son \$130,000 as his estimated one-eighteenth share. If this estimated amount exceeds the one-half of the one-ninth share to which each son will be ultimately entitled to, then and in that case, "no personal claim shall be made against such son or his estate for the repayment of such advances.

I am of the opinion that the trustees in estimating and advancing the sum of \$130,000 merely carried out the provisions of the ninth and eleventh clauses of the will and that no interest should be charged by the trustees on this amount so estimated and advanced. Of course, if the \$130,000 so advanced ultimately exceeds one-eighteenth of William's trust fund, then and in that case William's trust fund would be one-ninth of all the estate less said advance of \$130,000.

A casual examination of the prior decrees seems to show that the four sons were advanced by the trustees under the

same provisions of the will an additional sum of \$28,000 each. If this is found to be so upon a more careful examination of the same, the same rule would apply to the advance of \$158,000 as has been applied to the advance of \$130,000.

It was the duty of the trustees to have obeyed the directions of the ninth clause of the will "to invest each share separately" in trust for the nine children upon the trusts provided for. Whether or not the trustees should have made the division of the trusts into nine separate trusts before or after the death of the widow of William the elder is not necessary here to determine. The division should have been made without the shadow of a doubt at the commencement of this accounting period. The trustees cannot substitute their own judgment nor the decree of a court as a bar to the right for an immediate compliance with the terms of the will. Each trust has an undivided interest in the real estate. Each trust might have been represented by a separate trustee and, if so, each would have an equal undivided interest with the others in both the personalty and realty. See Surrogate Silkman's opinion, April 14, 1903.

It is possible to make an accurate subdivision now of nearly all of the property on hand, and it should be done. If trustees can withhold subdivision because a valuable tract of land remains unsold they could continually refuse to make any subdivision if a small or insignificant tract of land should remain unsold.

What the testator intended by his will was that the principal of his estate should be divided into nine equal parts and both principal and income paid over agreeably to the terms of the will.

In order that the trust funds may be administered accurately the decree should provide that the trustees forthwith divide the

estate in so far as the same is capable of subdivision into separate trusts as is directed by the will.

The contestants being now entitled under the terms of the will to all of the one-ninth share, except such portion as has been conveyed or assigned by them, they may make any arrangement or agreement with the trustees that they see fit as to their share. If they desire to force or compel a sale of all the real property they may do so; or if they desire by agreement to allow the trustees to manage and control the same, they may do that. As to the remaining trusts there is no occasion that I can see for leaving the property "en block" and a division of the same should be made forthwith agreeably to the provisions of the will.

If the trustees will consider the property in their possession as capable of subdivision the same as if it had been divided into nine equal trusts and will divide the principal and income accordingly, I think there will be no trouble in determining the respective amounts to which each party is entitled as it seems to me it would be simply a matter of computation.

If the parties cannot agree to the adjustment of the figures upon the basis suggested they may each submit a statement as to what their claim is and what the figures should be and the court will adjust them.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of
SAMUEL REISNER, Deceased.**

(Surrogate's Court, New York County, May, 1913.)

**WILLS—SUBSCRIPTION THEREOF BY TESTATOR AND WITNESSES ON FIRST
PAGE*—SUBSCRIPTION BY TESTATOR ALONE ON THIRD PAGE—SUB-
SCRIPTION INSUFFICIENT—DECEDENT ESTATE LAW, § 21(4).**

Where a will drawn on a blank, consisting of one sheet of paper folded so as to make four pages, was signed by the testator and the subscribing witnesses on the first page, and by the testator alone on the third page, it is not signed at the "end of the will" as provided by section 21(4) of the Decedent Estate Law, and probate of the instrument will be refused.

CONTESTED proceeding for probate of a will.

Jacob Newman, for proponent.

Kremer & Leavitt, for contestants.

COHALAN, S.—The will was written by testator himself on an ordinary will blank consisting of one sheet of paper, folded over at the middle to form four pages, so that, except for the fold at the top, the paper has the appearance of two sheets of legal cap paper fastened together at the top. The testator wrote several bequests in the part of the paper left blank for that purpose, filled in the name and address of the executor appointed, and, not having sufficient room to complete the will on the first page, he continued writing on the second page, which is on the reverse side of the first page. The will is continued on the inside of the paper from the second to

See Mills Surr., Vol. V, 10.

the third page, and the writing ends near the top of the third page, where the instrument is signed by the testator. To read from the first to the second page one must first turn up the first page and then turn the paper half-way about or upside down, and to continue the reading from the second page to the third page with the whole paper unfolded it is necessary to again turn the whole paper end for end. The testator signed the paper where he stopped writing on the third page. He also signed on the first page at the place on the will blank where the signature to a will is ordinarily affixed, and he signed his name again at the end of the printed attestation clause on the first page.

The witnesses to the will signed the attestation clause on the first page and also signed their names opposite the other signature of the testator on the first page. It is contended that the will can be read "logically" by beginning at the preliminary printed clause, "In the name of God, Amen, I, Samuel Reisner," etc., then right along through the clauses written by testator himself in the blank spaces of the form, down to the printed words, "I hereby appoint," etc. Proponent would then have us skip to the inside pages and read along to where testator finished his writing and signed his name, which is on the third page. We are asked then to come back again to the first page, to the clause beginning with the printed words, "I hereby appoint," in which Louis M. Brown, No. 787 Eighth avenue, New York city, is appointed executor. With this order of reading, testator's signature and the signatures of the two witnesses would come next, and then would follow the printed attestation clause and the other signatures of testator and the two subscribing witnesses at the bottom of the first page.

Section 21, subdivision 4, Decedent Estate Law, provides: "There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the

request of the testator." Proponent's counsel contends that the end of the will is found on the first page by reading the will in the manner described above, and *Matter of Field*, 204 N. Y. 488, is urged as controlling authority for such an interpretation of the words "end of the will."

The facts of the *Field Case* are entirely different from the facts of the case before me, and although the Court of Appeals laid down a more liberal rule than the one that had prevailed up to that time, on the question of what is the "end" of a will, there is no way that I can see by which even the language of the opinion can be applied to the present case. As the two witnesses did not sign their names at the end of this will, probate must be refused. *Matter of Hewitt*, 91 N. Y. 261; *Matter of Blair*, 84 Hun, 581; *affd.*, 152 N. Y. 645.

The executor named in the paper propounded as a will may tax his costs and the same will be allowed.

Decreed accordingly.

NOTE ON SIGNATURE AT END OF WILL.

The intent of the testator is immaterial. *Matter of Blair*, 84 Hun, 581, 152 N. Y. 645.

It has been held that a will is signed at the end when nothing intervenes between the disposition provisions and the subscription. In *re Dayger*, 47 Hun, 127; In *re Gilman*, 38 Barb. 364.

But it is also held that while the signature need not be in immediate juxtaposition with the concluding words of the instrument they must be reasonably near thereto. See In *re Fult*, 42 N. Y. App. Div. 593.

The signature should be at the physical termination of the testa-

mentary provisions. In re O'Neill, 91 N. Y. 516; St. Vincent De Paul Sisters of Charity v. Kelly, 67 N. Y. 409.

Will must be subscribed at the end and not in the center of the instrument. Matter of Dormer, 37 Misc. 57.

Where the body of the will and testator's signature were upon the first page of a sheet of note paper, and the signatures of the witnesses at the top of the fourth page, the intervening pages being blank, it is held to be a sufficient signature. Matter of Singer, 19 Misc. 679.

Where a paper on the first page was a complete form of a will with an attestation clause and on the second page there were further disposing clauses signed but not attested and the disposing provisions of the two pages had no relation to each, and there was no evidence that testator's signature was on the second page at the time of execution, held that the first page constituted the will. Matter of Mandelick, 6 Misc. 71.

Where the body of a will refers to a schedule attached thereto and the body of the will is signed and attested at the end and the schedules attached and referred to in the will, it complies with the statute Matter of Brand, 68 N. Y. App. Div. 225.

If a will be signed at the end thereof, it is not invalidated by a reference to a schedule which is not annexed. Thompson v. Quimbey, 2 Brad. 449; McQuire v. Kerr, 2 Brad. 244.

A will is signed at the end when it is merely followed by provisions or other matter not of a disposing nature, such as the date of the will, or the attestation clause. Fouché's Estate, 147 Pa. St. 395; Younger v. Duffy, 94 N. Y. 535.

A signature in the attestation clause is at the end of the will as the attestation clause forms no necessary part of the will. Matter of De Hart, 67 Misc. 13.

A signature after the attestation clause is good. Younger v. Duffy, 94 N. Y. 535; Matter of Laudy, 78 Hun, 470; Affd. 147 N. Y. 699.

Where a will contains a clause appointing executors and the date of execution, below the signature of the testator, it will be refused probate. Matter of Oidney, 17 Misc. 500.

A will drawn upon a printed blank covering only one page and signed

by the testator and subscribing witnesses at the foot of the page, does not comply with the statute, when the blank space in the printed form is filled up by subdivisions marked "First," "Second" provided by the words, "See annexed sheet," and such sheet is attached to the face of the blank by removable metal staples. *Matter of Whitney*, 153 N. Y. 359.

Where a will was written on a printed blank of one page with two subdivisions and subscribed at the bottom of the page, and a double sheet of legal paper containing in writing ten additional bequests was pinned to the printed blank it did not comply with the statute. In *re Fult's Will*, 42 N. Y. App. Div. 593.

A will drawn upon a printed blank folded in the middle so as to make four consecutive pages with an attestation clause at the top of the second page and executed at that point by the testator and attesting witnesses, so that the first two pages make a complete will, is not subscribed by the testator "at the end of the will" when the third page contains further material and complete disposition of property in no manner connected with the first or second pages, except that the third page is numbered "2nd page" and the second page is numbered "3rd page"; the draftsman having passed to the third page after he had filled the first. *Matter of Andrews*, 162 N. Y. 1.

But it was held in *Matter of Field*, 204 N. Y. 448, that where the testator drew his own will, using a short form printed blank, with six sheets written on one side pinned to the blank in space intended for bequests to which reference is made in the will, his signature at the end of the will was a sufficient compliance with the statute. *Matter of Field*, 204 N. Y. 448.

Where the will was a blank form on one sheet with "carried to back of will" written at the bottom "continued" at the top of the back page and at the bottom thereof "signature on face of the will" and the signature of testator and witnesses on the front page it was not such a subscription as required by the statute. *Matter of Conway*, 124 N. Y. 455.

Where decedent's signature was followed by a clause appointing an executor the paper was not entitled to probate. *Matter of Nies*, 13 St. Rep. 756. See *Matter of Jacobson*, 6 Dem. 298.

Where a will is signed in the middle of the clause appointing an

executor, held not to comply with the statute. *Sisters of Charity v. Kelly*, 67 N. Y. 409.

Though the testator by mistake subscribe beneath the attestation clause, it is sufficient. *Cohens Will*, 1 Tuck. 286; *Younger v. Duffy*, 94 N. Y. 535; *Matter of Acker*, 5 Dem. 19.

Where a will is duly signed by the testator at the end thereof the fact that the attestation clause is, by mistake written on an intermediate blank page, held, not to invalidate the execution. *Hitchcock v. Thompson*, 6 Hun, 279.

Where provisions relating to disposition of estate intervened between the signature and the attestation clause there is no signing at the end of the will as required by the statute. *Matter of Sanderson*, 9 Misc. 574.

Name written at beginning of will. *Armstrong v. Armstrong*, 29 Ala. 538.

Name written after attestation clause on the right. *Hallowell v. Hallowell*, 88 Ind. 251.

Matter of the Estate of AGNES RYWOLT, Deceased.

(Surrogate's Court, New York County, May, 1913.)

LEGACY—TO PASTOR OF CHURCH FOR SAYING MASSES—TO WHOM PAYABLE
—LAPSED LEGACY—DECEDENT ESTATE LAW, § 29.

A legacy to the pastor of a certain church, for the purpose of saying masses for the souls of testatrix and her deceased husband, is payable to the person who at the death of testatrix is the pastor of said church.

A legacy to a decedent who predeceased the testatrix lapses and is distributable under the residuary clause of the will, and where a child of said legatee also predeceased testatrix without leaving issue section 29 of the Decedent Estate Law as amended by chapter 384 of the Laws of 1912 does not apply.

PROCEEDING for the judicial settlement of the account of Joseph Polchinski, executor of the last will and testament of Agnes Rywolt, deceased.

William A. Keating, for executor.

James F. Donnelly, for Marian Obaroski.

Joseph P. Bourke, special guardian.

COHALAN, S.—This matter now comes before the surrogate upon an executor's accounting, in which a construction is asked of paragraphs three and ten of the will of the above-named decedent.

Paragraph three reads as follows: "I give and bequeath to the pastors of the following churches the amounts of money set after their names for the purpose of saying masses for the souls of my husband Frank Rywolt and myself: (a) St. Valentine's Polish Church, situated in Williamsbridge, \$250; (b) St. Cadmus Polish Church, Yonkers, N. Y., \$250; (c) St. Mary's Roman Catholic Church, Williamsbridge, \$250; (d) St. Joseph's Roman Catholic Church, near One Hundred and Seventy-seventh street and Washington avenue, Tremont, N. Y., \$250."

At the time of the death of the decedent, on the 25th of January, 1911, Rev. Antoni Jakuboski was the pastor of St. Valentine's Polish Church of Williamsbridge, and continued to be such up to on or about May 2, 1912. At the present time Rev. Charles Czarkowski is the pastor of the said church, and the executor asks this court to construe that paragraph so that it may be determined which of the two pastors is entitled to the aforesaid bequest. The legacy of \$250 should be given to the pastor of the church at the time of the death of the testatrix,

when the will took effect (see Matter of Zimmermann, 22 Misc. Rep. 411).

The tenth clause of the will reads as follows: "I give and bequeath to my granddaughters, the children of my daughter Julia Owsion, the amounts set opposite their names, with interest at four per cent. (4 %) from the time of my death to the time they are paid, to be paid to each on their becoming twenty-one (21) years of age, and if any one does not reach said age, then that one's share shall revert to the residuary estate: (a) To Agnes Owsion, the sum of \$200; (b) to Sophia Owsion, the sum of \$200; (c) to Victoria Owsion, now Mrs. Oboroska, the sum of \$200." The said Victoria Owsion (Mrs. Oboroska) died before the testatrix, leaving a daughter, Cecilia Oboroska, and a husband, Marian Oboroska. The daughter Cecilia also predeceased the testatrix, and the executor asks for instructions as to whom to pay this legacy of \$200 bequeathed to Victoria Owsion.

It is well settled that at common law a legacy does not vest in the legatee until the death of the testator, and should the legatee predecease said testator the legacy lapses and either sinks into the residue or is distributed according to the rule of the Statute of Distributions. *Savage v. Burnham*, 17 N. Y. 561; *Matter of Kimberly*, 150 id. 90; *Matter of Wells*, 113 id. 396; *Moffett v. Elmendorf*, 152 id. 475. An exception is created by statute (Decedent Estate Law, § 29, as amd. by chapter 384 of the Laws of 1912) saving from extinguishment a legacy bequeathed to a child or other descendant of a testator or to a brother or sister of a testator who shall die during the lifetime of the testator leaving a child or other descendant who shall *survive* such testator, but this section is inapplicable to the matter now before me, for the reason that the child of the legatee also predeceased the testatrix without leaving issue. The legatee, Victoria Owsion (Victoria Oboroska) and her

daughter, Cecilia Oboroska, both having predeceased the testatrix, never became entitled to the legacy of \$200, and the same must be distributed under the residuary clause contained in the will. Costs taxed. Insert amounts in decree and present the same for signature.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of the TITLE GUARANTEE AND TRUST COMPANY, as Executor of the Last Will and Testament of WILLIAM BUCHANAN, Deceased.

(Surrogate's Court, New York County, May, 1913.)

WILLS—INTENT OF TESTATOR—DISTRIBUTION PER STIRPES OR PER CAPITA TO BE ASCERTAINED FROM THE LANGUAGE THEREOF.

LEGACY—WHEN PAYABLE—EXEMPTION UNDER TRANSFER TAX LAW.

The intent of a testator as to whether his estate is to be distributed among his grandchildren *per stirpes* or *per capita* must be ascertained from the language of all the provisions of his will.

Where a legacy is presently payable to one who is also a contingent remainderman, the exemption to which under the Transfer Tax Law he is entitled as legatee is not to be deducted *in toto* from the legacy, but only in the proportion which the entire value of his interest in the estate bears to the value of the legacy.

PROCEEDING for the judicial settlement of the account of an executor.

Joseph H. Fargis, for executor.

Stetson, Jennings and Russell, for Adele Brown.

Davis, Symmes & Schreiber, for Charles L. Buchanan.

Russell H. Landale, for Frank E. Miller.

John V. Judge, for Joseph Kronethal.

Robert J. Turnbull, special guardian for Adelaide Buchanan.

De Lancey K. Jay, special guardian for infants, John J. Boyd and others.

COHALAN, S.—The Title Guarantee and Trust Company as executor under the last will and testament of the decedent has filed its account, and asks that the court construe paragraph tenth of the will in order that it may make a proper distribution of the estate. It also asks the court to determine the manner in which the transfer tax upon the respective remainder interests shall be apportioned.

The tenth paragraph reads as follows: “*Tenth*: I give and bequeath unto the Title Guarantee & Trust Company, a corporation organized under the laws of the State of New York, the sum of twenty thousand (\$20,000) dollars, in trust nevertheless, to invest and reinvest the same, and receive the proceeds thereof and to pay over the net annual income thereof unto William N. Clem (in recognition of his thirty years’ faithful service), for and during his natural life, and at the death of the said William N. Clem I give and bequeath the said sum of twenty thousand (\$20,000) dollars unto the children then living of my sons Charles P. Buchanan and William C. Buchanan, and the issue of such as may have died leaving issue then surviving, *per stirpes* and not *per capita*.” William N. Clem predeceased the testator. As his life estate constituted a preceding limitation and not a condition, the remaindermen became entitled to the *corpus* of the trust fund upon the death of the testator. *Wager v. Wager*, 96 N. Y. 164; *United States Trust Co. v. Hogencamp*, 191 id. 280.

At the time of the execution of the will the testator had two

sons living, Charles P. Buchanan and William C. Buchanan. The latter died before the testator and was survived by his two children, Adele Buchanan and William H. Buchanan. These children of William C. were living when the testator died. There were also living at that time Charles L. Buchanan, J. Roderick Buchanan and Adelaide Buchanan Baldwin, the children of testator's son Charles. These contend that the remainder after the life estate of William N. Clem in the trust fund of \$20,000 was bequeathed by the testator to the children of his sons, Charles P. Buchanan and William C. Buchanan, *per capita*, and that each of the children of Charles P. and William C. Buchanan takes an equal interest in the said fund, while William H. Buchanan and Adele Buchanan, the children of William C. Buchanan, contend that the trust fund was bequeathed to the children of Charles P. and William C. Buchanan *per stirpes*, and that they are entitled to \$50,000 each, while the children of Charles P. Buchanan are only entitled to \$3,333 each.

The intent of the testator, as ascertained from the language of the particular paragraph above referred to, as well as from an examination of all the provisions of the will, must govern in the determination of the question whether the testator intended that the remainder after the life estate to William N. Clem should go to the children of his sons, Charles P. Buchanan, and William C. Buchanan, *per stirpes* or *per capita*. It is a rule of construction that where a gift is made to a person standing in a certain relation to testator, and to children of another person standing in the same relation, the former takes only a share equal that of each of the latter; but the intent of the testator to make such a disposition of his property must be manifest from the language of the will. In *Matter of Verplanck*, 91 N. Y. 439, it was held that the bequest to nephews and nieces of testator's brother and sister was intended to be *per capita* and not *per*

stirpes; but in that case the court examined all the provisions of the will in order to ascertain the intent of the testator. It is manifest that the testator herein intended that the issue of any of his grandchildren who died before the termination of the life estate should take *per stirpes* and not *per capita*, because the direction for such method of distribution immediately succeeds the clause designating the beneficiaries. The same language in regard to the method of distribution is used by the testator in paragraphs ninth and seventeenth of the will. In paragraph twenty-second he provides that if any legatee contests the probate of the will the share of the one so contesting shall go to the other children *per stirpes* and not *per capita*. In the second codicil he provides that the remainder after the life estate to Charles C. Pise and his wife shall go to the "children then living of my sons Charles P. Buchanan and William C. Buchanan and the issue if such as may have died leaving issue then surviving, *per stirpes* and not *per capita*." In the eighth paragraph of the second codicil he directs that the remainder after the life estate of his son Charles P. Buchanan shall be paid to the children of Charles P. Buchanan then living and the issue of such as may have died, leaving issue then surviving, *per stirpes* and not *per capita*. He also provides that the remainder after the life estate of his grandson Howard Buchaann shall be paid to his "children then living, and the issue of such as may have died, leaving issue then surviving, *per stirpes* and not *per capita*." In the same paragraph it is also provided that if the said Howard Buchanan should not leave any children him surviving, then the principal is to be paid to his sister, if living, and if she should be dead, leaving issue then surviving, the principal is to be paid to such issue *per stirpes* and not *per capita*. He also provides that if his grandson Howard Buchanan should die without leaving issue, and his granddaughter Adele Buchanan should then be

dead without issue surviving, the principal "shall be divided *per stirpes* and not *per capita* among those persons who at that time answered to the description of my next of kin." It therefore appears from the entire context of the will that the testator intended that the distribution of his property should be *per stirpes* and not *per capita*. In every case where he directs the distribution of the remainder after a life estate in a trust fund there is a comma after the names of the children to whom such remainder is bequeathed, and a comma after the word "surviving" in the intervening phrase immediately before the words "*per stirpes* and not *per capita*." This would seem to indicate that the words "*per stirpes* and not *per capita*" were intended by the testator to qualify both of the immediately preceding clauses, namely, the clause descriptive of the persons who would take the remainder in the first instance and the clause descriptive of those who would take in the event of the death of any of those primarily entitled to take. If in the tenth paragraph the words "*per stirpes* and not *per capita*" were inserted after the names of the testator's children, there could be no doubt about the intent of the testator; but it would be necessary to repeat the words after the clause providing for the distribution of the share of any of their issue who may have died leaving issue them surviving. In order to prevent the repetition of the words "*per stirpes* and not *per capita*" the testator inserted a comma after the names of his sons to whose children he bequeathed the remainder, and again after the direction that the issue of such as may have died should receive a share of the estate, thereby intending to qualify both of the preceding clauses by the words "*per stirpes* and not *per capita*." If the testator had intended to limit the distribution *per stirpes* to the issue of such of his grandchildren as had died, there would be no need of inserting a comma after the word "surviving"; it would be superfluous. The fact that in

all the paragraphs of the will where there is a direction for distribution after the death of any of the testator's grandchildren a comma is inserted after the word "surviving" indicates that the testator sought to accomplish a certain definite purpose by its insertion; and the only purpose which it could accomplish would be to extend the qualifying effect of the words "*per stirpes* and not *per capita*" to the two immediately preceding clauses. As its omission would clearly indicate that only the last clause was qualified by the words "*per stirpes* and not *per capita*," so its insertion indicates that the qualifying words apply to both clauses.

It has been held that if from any expression of the will an intention can be discovered that the children of a deceased daughter are to take as a class and not as individuals, that intention must prevail. *Ferrer v. Pyne*, 81 N. Y. 281; *Matter of Kehoe*, 112 App. Div. 414. It would therefore appear that the testator intended that the trust fund mentioned in paragraph tenth of the will should be distributed among his grandchildren *per stirpes* and not *per capita*.

The executor also asks that the court determine how the transfer tax upon the various remainders after the life estates provided in the will shall be apportioned. The transfer tax upon the value of the respective life estates and the remainders thereafter should be paid out of the particular trust funds set apart for the benefit of the life tenants. *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Tracy*, 179 id. 501. As each of the decedent's grandchildren is entitled to an exemption of \$5,000, the special guardian for Adelaide Buchanan contends that her share of the fund mentioned in the tenth paragraph of the will should be paid to her free from any transfer tax, and the same contention is made by the attorneys representing the other participants in the said fund. As the statute does not provide that any particular portion of the property passing to a bene-

ficiary shall be exempt, but only that of the entire amount transferred \$5,000 shall be exempt, the beneficiaries are not entitled to set apart any particular \$5,000 for the exemption. The \$5,000 is to be deducted from the value of the entire legacy, and those entitled to participate in the trust fund disposed of in paragraph tenth of the will are entitled only to an exemption on that amount in the proportion which the entire value of the bequests made to them bears to the amount to which they are entitled under that paragraph. The amount of the tax as so ascertained is to be deducted by the executor from the amount paid over to the legatees under paragraph tenth of the will, and the tax upon the remainder of their respective interests in decedent's estate is to be paid out of the respective trust funds in which they are interested as remaindermen.

Submit decree in accordance with this decision, and tax costs on notice.

Decreed accordingly.

Matter of the Application for the Appointment of a Successor of One of the Deceased Testamentary Trustees of the Estate of AUGUSTUS ZEREGA, Deceased.

(Surrogate's Court, New York County, May, 1913.)

TRUSTEES—TESTAMENTARY—APPOINTMENT OF A SUCCESSOR TESTAMENTARY TRUSTEE—CODE CIV. PRO., § 2818—WILLS.

Where all but one of four trustees die to whom, and the survivors of them, testator devised his estate in trust, an application for the appointment of a successor testamentary trustee, under section 2818 of the Code of Civil Procedure, must show that it is for the benefit of the *cestuis que trustent* so to do.

Where the answers to the petition completely negative, or explain, all the material facts tending to show a benefit to the *cestuis que*

trustent by the appointment of a successor trustee, the benefit to the trust is doubtful, and the application being contrary to the express terms of the will must be regarded with disfavor and denied.

APPLICATION for the appointment of a successor trustee under section 2818, Code of Civil Procedure.

The petitioners herein are Richard A. Zerega, trustee of the trusts of John A. Zerega, Bertha V. Zerega and J. Frederick Zerega; Louise A. Zerega di Zerega, trustee of the trusts of Louis A. Zerega, J. Frederick Zerega and Bertha V. Zerega; Catherine Berry Zerega, trustee of the trust of John A. Zerega; Francis A. Zerega, Elizabeth Herring Zerega di Zerega; John Frederick Zerega, trustee of the trusts of John Frederick Zerega and Bertha V. Zerega; Alfred L. B. di Zerega, W. Irvine di Zerega, Elizabeth Conklin Pelham-Clinton; Randolph Hurry, trustee of the trusts of John A. Zerega and John Townsend C. Zerega.

J. Noble Hayes, for petitioner.

Dawson Coleman Glover, special guardian.

Ambrose S. Murray, Jr. (Theodore F. Humphrey of counsel), for some respondents.

Murray, Ingersoll, Hoge & Humphrey, for respondent John H. McFadden, as sole acting executor, etc., of Frederic Christian Zerega.

FOWLER, S.—The petition alleges that Mr. Augustus Zerega, the testator, died on the 23d of December, 1888, possessed of an estate of about \$2,000,000, real and personal, and that his will was admitted to probate on the 11th of February, 1889. By the terms of such will the testator nominated and appointed

as his executors and executrices and testamentary trustees his wife, Eliza Morch Zerega, and his sons John A. Zerega and George Theodore Zerega, and his daughter Louisa A. Barnard, all of whom qualified. The testator devised and bequeathed to his said executors and executrices all his real and personal property "to them and to their survivors and successors, with full and absolute power to sell and dispose of the same or any part thereof at public or private sale at such time or times, in such manner and upon such terms as to them or a majority of them shall seem meet, it being, however, expressly provided that during the active exercise of her powers as executrix or trustee the wish of my said wife is to control all others, in trust, to invest and reinvest the said personal estate and any proceeds of said real estate, sold or to be sold, in good securities, to collect and receive the rents, profits, dividends, interest and income arising and to apply and dispose of the same as follows:

"*First.* To pay over and deliver all the rents, interest, dividends, profits and income which may be collected and received by my executors or any of them to my said wife, Eliza Morch Zerega, whenever the same shall be collected or received during her natural life, whether she remains single or remarries." The will further provided for the division, on the death of the widow, of the whole of the said estate, including the proceeds of the real estate when sold into eleven equal portions, and for the payment of each of said portions under the terms and conditions therein specified to the testator's sons, John A. Zerega, Louis H. Zerega, Francis A. Zerega, George Theodore Zerega, Frederic C. Zerega, Albert L. B. Zerega, Albert Zerega Von Bretton, an adopted son, the testator's grandson John Theodore C. Zerega, and to his daughters Louisa A. Barnard, Azelia C. Huntington and Augusta Florence Zerega.

The petition alleges that the real estate remaining undis-

posed of and subject to sale under the will consists of about 114 acres of land, with a residence and dwelling thereon, known as "Island Hall," situated on Throggs Neck, in the East River, in Westchester county, N. Y., of the value of between \$600,000 and \$700,000; of the house at No. 26 East Thirty-fifth street, New York city, of the value of about \$80,000, or thereabouts, and an estate in Virginia, comprising about 573 acres.

It is alleged also that George Theodore C. Zerega, one of the executors and trustees, died in November, 1907, and Eliza Morch Zerega, the life beneficiary and also an executrix and trustee, died on the 26th of March, 1909, being then in her 100th year. In 1909, Louisa A. Barnard, as trustee, commenced an action in the Supreme Court for a construction of the said will and testament and a settlement of her accounts as trustee. John A. Zerega, Sr., trustee, appeared in the action and interposed an answer setting forth among other things that Louisa A. Barnard, trustee, had occupied a portion of the trust estate, to wit, the dwelling house at No. 26 East Thirty-fifth street, as her private residence, and that of her immediate family exclusively for many years without payment of rent, and that she was indebted to the said estate for the rent of the said premises during the said period, and for other reasons stated he asked that he be permitted to file a separate account. Each trustee thereafter filed a separate account.

The petition further alleges that the said John A. Zerega defended the said action, and prosecuted the said claim of rent against the said Louisa A. Barnard therein on behalf of the said estate and the persons interested therein under the said will, who were also made parties defendant to the said suit, until he was subsequently joined in the assertion of the said claim by a majority of the remainder interests appearing in the said action, and that such proceedings were had in

the said action that final judgment was entered therein on August 17, 1911, which, among other things, adjudged that the trustee, Louisa A. Barnard, plaintiff in said action, was liable for the rental value of house No. 26 East Thirty-fifth street, from November 23, 1896, to March 26, 1909, amounting to the sum of \$25,812.50, in addition to \$156.50 water rents paid by the said estate, amounting in all to the sum of \$25,969, and surcharging the account of Louisa A. Barnard, trustee, with the said sum of \$25,969 and making such surcharge a lien upon her interest in the said trust estate and offsetting the same against her interest in the said trust estate.

The petition further alleges that by a decree entered on August 17, 1911, all of the accounts and supplemental accounts made by the trustees were brought down to January 3, 1911, and that the approximate amount of personal property remaining undistributed is \$50,000. Louisa A. Barnard has not paid the amount of the claim awarded against her for rent, but the same has been withheld from her distributive share of the estate pending an appeal which she has taken to the Appellate Division from the said judgment surcharging her account with such sum. This amount was awarded for rent down to the time of the death of Eliza Morch Zerega on March 26, 1909, and no further. But it is alleged also that Louisa A. Barnard continued to occupy the said premises down to July 1, 1911, without the payment of rent, and that she is still liable to the estate for such rent.

It is also alleged that John A. Zerega died on April 26, 1912, leaving the estate with but one surviving trustee, Louisa A. Barnard, who is now seventy-two years of age, and it is claimed by petitioner that the interests of the sole surviving trustee are adverse to the interests of the estate, as she is seeking to have the judgment surcharging her account with the rent, as aforesaid, reversed.

The petition further alleges, upon information and belief, the names of the persons who now have an interest in the said estate of Augustus Zerega, deceased, or claim to have or may have some interest therein, and the nature of such interests and the amount of their proportionate shares, and their relationship, so far as the same are known.

Upon information and belief the petition also alleges that the said Frederic C. Zerega, who at the time of his death was seized and possessed of and entitled to a one-eleventh part or share of the real and personal property in the said estate of Augustus Zerega, deceased, died on October 27, 1911, at London, Eng., leaving an alleged last will and testament and codicils thereto which were admitted to probate at London, Eng., on March 4, 1912, by the Probate Division of His Majesty's High Court of Justice, and which said will and codicils have been or are about to be offered for probate in the county and state of New York, and the number and names of the persons interested in his said estate as heirs at law and next of kin and as executor, executrix, legatee and devisee.

The petitioners ask for the appointment of John Theodore C. Zerega as a trustee in place of the said John A. Zerega, deceased, and allege that the interests of the entire trust estate require such appointment, and that if such appointment is not made the interests of said estate and of all persons interested in it who are opposing the appeal of the said Louisa A. Barnard and her personal claim against the estate will be imperilled. It is stated that John Theodore C. Zerega is a grandson of the decedent and a gentleman of independent fortune. His city address is No. 37 West Forty-fourth street, and he resides in Newport, R. I., and it is alleged that he has a complete knowledge of the affairs of the estate, and is qualified and competent to act as trustee and will consent to waive any commissions for taking over the estate and administering the same.

The special guardian, Mr. Glover, unites in asking that the prayer of the petition be granted.

The answer of the respondent Louisa A. Barnard admits many of the allegations of the petition, but alleges that the residence and dwelling known as "Island Hall" is situated in the borough of the Bronx, city of New York, and does not exceed in value the sum of \$556,000, and that the premises No. 26 East Thirty-fifth street does not exceed in value the sum of \$60,000, and that the estate in Virginia comprises about 573 acres, and was sold pursuant to judgment in partition, duly rendered by a competent court of said state of Virginia having jurisdiction, about a year prior to the date of verification of the petition herein and that the proceeds derived from said sale were distributed to the several remaindermen. Respondent further denies that after the death of Eliza M. Zerega she was or could be liable to the estate for any rent for the premises No. 26 East Thirty-fifth street, and alleges that if she was liable for any said rent such liability would be to her cotenants in the fee to said property, and further alleges that such liability is already the subject of and at issue in a certain partition action now pending in the Supreme Court. She further alleges in regard to her appeal from the judgment in regard to the rent of the premises at No. 26 East Thirty-fifth street, that the same is wholly within her rights, is not inconsistent with her duties as trustee and that all expenses of said appeal and review have been paid out of her own funds. Respondent denies that there remains in her hands as trustee for the estate the sum of \$50,000 for distribution. She denies that the interests of the estate require the appointment of a new trustee, and avers upon information and belief that John Theodore C. Zerega is not qualified to act as such trustee.

Respondent further alleges that by the judgment or decree on said accounting action, entered August 17, 1911, the fee

to the real estate, none of which had up to that time been sold, was held to have passed to the remaindermen, or their assigns, at the death of Eliza M. Zerega, and no longer formed a part of the estate of Augustus Zerega, deceased, the provisions of said judgment in respect to the same reading as follows: "V. That upon the death of Eliza M. Zerega, March 26, 1909, the following named parties became seized and possessed in fee simple absolute of the following respective undivided parts or shares of and in all and singular the real property of which the said testator, Augustus Zerega, died seized and possessed, subject only to the execution of the power of sale given to the trustees in and by the said will of Augustus Zerega."

The respondent further alleges that by reason of a partition action commenced for the sale of all the real estate situated in the county of New York she cannot make such sale, although it was determined by said judgment of August 17th, that she had the power of sale over said premises.

The respondent alleges also that the entire personal estate now in her hands as trustee, including the \$25,969 rent due from her, amounts to \$43,557.78, and that there is no necessity for the appointment of a new trustee for distribution of the same. She further alleges that all the petitioners herein are parties to the appeal proceedings heretofore referred to and can defend the same, and that the addition of a new party in the person of a substituted trustee cannot in effect assist them in anywise or lessen their expenses in this proceeding. The respondent asks that if it shall seem necessary to the court that a new trustee be appointed that the court appoint the Farmers' Loan and Trust Company of New York. That she is informed by the said Farmers' Loan and Trust Company that in the event it should be appointed such substituted trustee it would stipulate and consent and waive the commissions for receiving and taking over said trust upon its appointment and

that such appointment would also save the expenses of a trustee's bond.

In a replying affidavit by Louisa A. Zerega di Zerega, one of the petitioners, it is alleged that it is not true that the proceeds of the property belonging to the estate in Virginia have been entirely distributed; that the litigation is still pending regarding the distribution of the same. She further alleges that she is informed and believes that Ambrose Spencer Murray, Jr., the attorney for Louisa A. Barnard, the respondent in the present proceeding, is a tenant of, an individual stockholder in, and for many years has been an inspector of elections of the Farmers' Loan and Trust Company, and that the petitioners verily believe that the appointment of the Farmers' Loan and Trust Company would not give them the protection which they are seeking in this proceeding, and in fact that the appointment of a trustee other than one of the members of the family who are petitioners herein would not accomplish the object of the said petition.

Similar answers opposing the application for the appointment of John Theodore C. Zerega and asking for the appointment, if any is made at all, of the Farmers' Loan and Trust Company are also filed by Augusta Florence Zerega, Horace Barnard, John Augustus Barnard and Louis H. Barnard and by John H. McFadden, as sole acting executor under the will of Frederic Christian Zerega.

In the foregoing statement I have set out, with some care, the substance of the more important allegations contained in the petition and the several answers in this matter. The petition for the appointment of a successor trustee purports to be made under section 2818, Code of Civil Procedure. The testator by his will nominated and appointed his wife and three of his children as his executors and trustees, and he devised and bequeathed to them *and to their survivors and successors*, a com-

prehensive power of sale, and all his estate to be taken and held on certain trusts, limited in the will. It is manifest that testator's college of trustees was selected by him with care out of all his descendants, and this preference is to be taken here as the deliberate expression of testator's intention. His estate and a power thereover were expressly limited to such persons and to the survivors of them. I must assume that the testator intended that his estate on the death of one or more trustees should pass to the survivors, as it was so limited. In so far as it was necessary these persons and the survivors of them were given the legal estate by the testator. When any one takes and holds the legal estate, even though he be a trustee, he has all the rights to trial by jury and to the legal remedies which attach by the common law to the legal estate. The legal estate has always been a subject of great concern in those courts which proceed according to the course of the common law. It carries with it superior rights and remedies fully protected by the Constitution. The expressed intention of the testator, concerning the devolution of the legal estate, is not, I think, to be treated as a matter of small importance. To interfere inconsiderately with the legal title I consider a high and dangerous usurpation, and to be justified only by the clearest proofs, imperatively necessitating such equitable interference. Section 2818, Code of Civil Procedure, states in substance that where one of two or more trustees dies, or resigns, or is removed, a successor trustee shall not be appointed, except where such appointment is necessary, in order to comply with the terms of a will. Trustees hold in joint tenancy and on the death of one survivorship accrues. This the testator knew, and must be presumed here to have intended. The fact that the limitation in the will also names "successors" must be presumed to provide for a situation where there are no survivors of the original trustees.

But it is insisted by the moving parties that section 2818,

Code of Civil Procedure, also provides in substance that where the court shall be of the opinion that the appointment of a successor (trustee) would be for the benefit of the *cestui que trust* the surrogate may appoint. The Code, as amended in 1884, does now so provide. What this amendment may really intend can be determined only by reference to principles of the general law. That it does not mean that the court can disturb the legal title, at its own will, I am certain. Several of the cases cited to me by counsel for the moving parties I do not find in the volumes cited; others are not remotely in point, while others, notably *Matter of Dietz*, 132 App. Div. 641, and *Matter of Leavitt*, 135 id. 7, are not, I think, favorable to this application. What, then, should I do in this matter under the circumstances herein disclosed? It seems to me that it is only when the sole surviving trustee is in some way incapacitated that section 2818, Code of Civil Procedure, calls for the appointment of a successor trustee and the interference with the devolution of the legal estate, prescribed by the testator himself. If I should add one new trustee, as petitioned in this matter, there would then be no majority in the college of trustees, and the action of one may neutralize the responsibility and action of the other, chosen by the testator himself. This is a consideration not adverted to on the argument. But it is entitled to some little thought.

The principle on which courts of equity usually proceed in the appointment of new testamentary trustees is ancillary to its principal duty to see that the trusts are properly executed. In a direct proceeding to remove a trustee a totally different set of principles would apply, and the first consideration would be the proper execution of the trusts. Courts of equity will not hesitate to remove a trustee in a proper case. When the trusts are in course of execution, or not shown to be endangered, the court should not disturb the scheme of a testator. The Code specifies the instances in which testamentary

trustees may be removed by the surrogate (Code Civ. Pro., § 2817), but the conduct of Mrs. Barnard, the sole surviving trustee, is not brought within the requirements of that section, nor is this petition addressed to that section, and yet her conduct and situation are made the grounds of an application to join with her an additional trustee. As I read section 2818, Code of Civil Procedure, a successor trustee may be appointed only when it is for the benefit of the *cestui que trust*. It is not clear to me that it would be for the real benefit of the *cestuis que trustent* to appoint a successor trustee in this instance. The answers completely negative or explain all the material facts tending to show a benefit to the *cestuis que trustent* by the appointment of a successor trustee, and on this application the answers must be taken as true. I doubt in any event that section 2818, Code of Civil Procedure, was intended to embrace a case such as that here presented.

The trusts remaining unexecuted may be I think well and sufficiently executed by the surviving trustee. On the death of the life tenant the remainders vested, and the execution of the power of sale, vested in the trustee, will probably require the assent of the remaindermen in some way. The trustee has already accounted to the satisfaction of the Supreme Court of this state and nothing is shown by petitioners which makes it apparent that she will not well and truly account for the residue of the trust estate. Apprehension is not enough to warrant an interference by the surrogate.

The controversy over the occupancy of the house taken by testator's wife as tenant for life is one between the trustee, in her individual capacity, or as one of the beneficiaries taking under the will of her father, and the other surviving members of the testator's family. The liability of Mrs. Barnard for such occupation, no doubt, arose under an honest mistake as alleged in the answer, and the judgment against her therefor

seems fully protected, so as not to endanger the trust estate. It was such a controversy as often arises between members of the same family in the settlement of an estate and the proceeding which ended in a judgment against her is no doubt in course of orderly and fair solution. The fact that the judgment on one debatable point was against the trustee discloses that the appeal will not be concluded prejudicially to the trust estate, as those who were active in pressing the claim against Mrs. Barnard are shown to have a standing on the appeal. The presumption is for the judgment. The other matters alleged by petitioners against the sole surviving testamentary trustee do not seem to require special mention.

It appears to me that the remedy of the petitioners, if they have other or any sufficient grounds for a new trustee, would be one made to a court of competent jurisdiction to remove the sole surviving trustee and for the appointment of a new trustee who should be indifferent to all the *cestuis que trustent*. In such a proceeding a proper inquiry could be made by the court as to the truth of the allegations and answers.

I have not examined the point of merger as affecting the sole surviving trustee's trusts for her own benefit, as it was not mentioned in the papers or by counsel, nor was it made the ground of argument. I am satisfied on the showing made before me that I am bound to deny the prayer of the petition and it will be so decreed. Settle order accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of SICKLER
P. WEED and LEONARD J. WEED, as Surviving Executors of
the Last Will and Testament of JOSEPH L. WEED, Deceased.

(Surrogate's Court, Saratoga County, June, 1913.)

**EXECUTORS AND ADMINISTRATORS—SURCHARGING ACCOUNTS OF—WILLS—
ESTOPPEL.**

Where certain real estate was devised to testator's children in equal shares subject to the life estate of their mother, and the executors acting under a naked power given by the will sold a farm to one of testator's children for \$5,000, and it appears that one of the residuary devisees, seeking to surcharge the accounts of the executors with a loss upon allegations that they were negligent in selling the farm for less than its fair market value without proper effort to obtain such value, had stated that if all the rest were willing to sell for \$5,000 she would take the same, and the executors act thereon, she is estopped from questioning their acts in relation thereto.

PROCEEDINGS upon the judicial settlement of the account of surviving executors.

Irwin Esmond (James W. Verbeck, of counsel), for Sickler P. Weed and Leonard J. Weed.

H. E. McKnight, for Jennie E. Witbeck.

OSTRANDER, S.—Deceased devised certain real estate for life to his widow with remainder to his six children, equally. He gave his executors "full power and authority to sell and dispose of any and all of my real property as to them may seem best." The executors were not trustees and the above power is a naked power of sale. The executors acting under this

power sold a farm to one of the children for \$5,000 and have brought the proceeds into court for distribution. Contestant, Mrs. Witbeck, one of the residuary devisees, objects to the price received, alleging that the executors violated their duty by negligently selling this farm for less than its fair market value, without proper effort to obtain such value. She seeks to surcharge their account with the loss so occasioned. The executors challenge the jurisdiction of this court to determine this controversy, claiming that the jurisdiction of the court is strictly confined to the distribution of the proceeds of sale as produced in court by the executors, and that this court may not question the propriety of their acts in reference to the sale.

No question is presented of the power to sell. Nor is there any question of fraud involved; nor any question of a testamentary trustee's dealing with his trust as in *Matter of McInerney*, 62 Misc. Rep. 441. Nor does the will give the executors absolute discretion as to the amount for which the property shall be sold. It gives, rather, a discretion as to how much of the property shall be sold, if any, and when.

Under section 2726 of the Code, the Surrogate's Court may compel a judicial settlement, after one year, of an executor's account, where he has sold any of decedent's real estate pursuant to a power contained in the will. There being no question of fraud alleged, nor any question involved requiring relief in equity, I think this court has power to determine on this accounting the question of the executors' care and diligence in selling the property. *Baldwin v. Smith*, 3 App. Div. 350.

Any other conclusion would leave to the court the mere clerical duty of dividing such sum as the executors chose to bring in after selling property in the most careless manner; a result which I do not think the statute contemplates.

This brings us to the question whether the executors were negligent in selling the farm at less than its fair market value.

There is no evidence or claim of any corrupt action by the executors. They sold their own share as well as contestant's share. They also sold the shares of all the others, equally interested, none of whom, except contestant, complain of the price received. While this is not conclusive upon the question of negligence, it is a circumstance to be seriously considered.

There was a great divergence of opinion among the witnesses as to the value of the farm at the time it was sold. The contestant's witnesses place the value at from \$6,162 to \$8,337.50 while the executors' witnesses place it from \$4,000 to \$5,000. Contestant and her husband say that they told one of the executors that he, contestant's husband, would furnish a man who would pay \$6,000 for it. This is flatly denied by the executors. One of the executors testified that he had inquired of a number of people, including one of the town assessors, what the farm ought to bring and that not one thought it worth over \$5,000. But it is not necessary to pass upon this issue of fact, since the contestant says that she afterward told the executors that if all the rest were willing to sell for \$5,000 she would take what the rest would take. The executors having acted on this consent given by her, which she does not dispute but expressly admits, she is estopped from questioning the acts of the executors done in pursuance of it.

I do not think that the evidence warrants a decree surcharging the executors. The objections are, therefore, disallowed, without costs to any party.

Decreed accordingly.

**Matter of the Final Judicial Settlement of the Accounts of
the Executors of the Last Will and Testament of MARY
SLINEY, Deceased.**

(Surrogate's Court, Dutchess County, June, 1913.)

WILLS—TESTAMENTARY INTENTION—USE IN WILL OF MISNOMER.

Where it appears by extrinsic evidence that a bequest of \$1,000 was intended for the "Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children," an incorporated society, and the use in the will of the name "St. Joseph's Union," an unincorporated branch of said mission was a misnomer, the testamentary intention will be effectuated by payment of the money to the mission.

PROCEEDING upon the final judicial settlement of the accounts of executors.

Fred E. Ackerman, for executors.

Morschauser, Mack & Mulvey, for residuary legatees.

William J. Fanning, for St. Joseph's Union.

John J. Mylod, for state comptroller.

HOPKINS, S.—Mary Sliney, a resident of Wappingers Falls, Dutchess county, N. Y., died leaving a will, which in and by its third paragraph provided as follows:

"*Third.* I give and bequeath unto St. Joseph's Union at No. 375 Lafayette Street, New York City, New York, the sum of One Thousand Dollars."

Upon this accounting by her executors, the residuary legatees under said will, who are nephews and nieces of the testatrix,

claim that this legacy fails, and should pass into the residuary estate, and be distributed among them upon the grounds:

First: "That St. Joseph's Union is an unincorporated association and cannot take the bequest," and

Second: "That the gift is absolute, and did not create a trust, and cannot be sustained under the provisions of section 113 of the real property law."

In examining the cases of a similar nature passed upon by the higher courts, I find that there is a conflict of opinion upon identical facts, and therefore as I am unable to make a distinction, or to say why similar facts should require or produce different decisions and judgments, will confine myself to the facts of the case before me.

The cases referred to are: *Bowman v. Domestic & Foreign Mission Society*, 182 N. Y. 494, and *Fralick v. Lyford*, 107 App. Div. 543; *affd.*, 187 N. Y. 524.

It appears from the testimony in this proceeding that St. Joseph's Union is a branch of the Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, an incorporated society, and engaged in the same charitable work; that both of said societies were founded by a priest named Father Drumgold, who was formerly the pastor of a church at Wappingers Falls where the testatrix worshiped; that testatrix was interested in the work conducted by said priest; that both of said societies occupied offices in the same building in the city of New York, and both have the same officers, the union being maintained as a branch of the mission.

It is claimed by the union that from these facts the testatrix intended that this bequest should be for the benefit of the society conducted by her former pastor, and that she desired it to be paid to, and used for, the purposes for which the mission was incorporated, and that in the preparation of her will she mis-named the society intended.

The intention of the testatrix should prevail, so far as it is possible to ascertain that intention from her will and the extrinsic evidence produced, and so far as it is consistent with law.

It is evident that she did not intend that her nephews and nieces should have the amount of the legacy in question, and it is equally evident that she did intend it for the society. If she made a mistake in naming the proper beneficiary, so that the object of her bounty could not be ascertained from the will alone, it is the duty of this court to rectify such mistake and direct the payment of said legacy to the society contemplated by the testatrix, if such can be determined from the evidence and surrounding circumstances.

Therefore it seems to me that the testatrix intended this bequest for the Mission of the Immaculate Virgin, and that the use of the name "St. Joseph's Union" in said will was a misnomer, and that her intention will be carried out by paying over the bequest to the mission, and thus substantial justice will be done.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament and
Codicil of GEORGE C. COFFIN, Deceased.**

(Surrogate's Court, Kings County, June, 1913.)

EVIDENCE—OF UNDUE INFLUENCE WHOLLY CIRCUMSTANTIAL—WILLS.

Where though the evidence is convincing that the only cause for testator's separation from his wife and children for the last ten years of his life was his devotion to the chief beneficiary under his will and codicil with whom during the same period he had maintained a meretricious intimacy and that she established an influ-

ence over him that barred his return to his marital and parental duty, but the evidence that such undue influence extended to the making of his testamentary acts is wholly circumstantial and contains no direct view of the beneficiary in the act of unduly influencing testator in making either his will or the codicil thereto, both instruments may be admitted to probate.

PROCEEDING upon the probate of a will.

Hamilton Anderson, for proponent, William H. Blain, executor.

Atwater & Cruikshank (Alfred B. Cruikshank, of counsel), for Belle C. Provost, legatee.

Augustus Van Wyck, for contestants, heirs at law and next of kin.

KETCHAM, S.—It cannot be questioned that the will and codicil here propounded were duly executed, nor is it doubtful that the testator was possessed of testamentary capacity; but it is urged that the instruments were induced by the undue influence of the sole beneficiary named in the will.

The testator, for the last ten years of his life, separated himself from his wife and children without any excuse. For a period precisely corresponding with this estrangement from his family, he maintained with the beneficiary an intimacy which must be found, in the euphemism of the law, to have been meretricious.

The evidence is convincing that the only cause for the decedent's desertion of his home was his devotion to the beneficiary and that, having once detached his affections, she established an influence over him which lasted for his remaining days and barred his return to marital and parental duty.

There is no need for a recital of the facts which support these conclusions. They plainly exhibit a malign influence which, whether imposed upon the testator by evil persuasions or embraced by his own choice, tended not only to divorce him from those to whom he owed loyalty and companionship but to divert from them the material benefits of his estate.

But though it is thus manifest that the testator was subject to the undue influence of an association which warped his life and controlled his conduct in its most important relations, the question must remain, is there evidence that this undue influence extended to the testamentary acts?

The case sharply illustrates a notorious obliquity in our procedure.

It is the duty of the surrogate to fairly and faithfully try the present controversy and a fair decision to render thereon according to the proofs. This is the requirement of the law as to every trial. It is imposed by the oath of office. It is distinctly enjoined by the statute as to contested wills. Code Civ. Pro., § 2622.

It would result from these commonplaces—and, indeed, is the legal pretense—that a decision thus reached must be authoritative and final; but the practical truth is that the surrogate's determination is empty and provisional.

If it be in favor of the will, the contestant will not be thereby prevented from maintaining her action under section 2653a of the Code, in which she may submit anew to a jury the whole question of "will or no will," with but formal embarrassment from the surrogate's decree.

If it be against the will, the Appellate Division will inevitably subvert the result and direct a trial of the same question before a jury if the case comes to their attention upon appeal.

The considerations which constrain an appellate court in

reviewing a decree of the surrogate rejecting a will are well known.

In *Matter of Tompkins*, 69 App. Div. 474, the court, in reversing a decree refusing probate, says: "In *Matter of Van Houten* (11 App. Div. 208) we held that when the disposition which should be made of the questions of fact presented by the evidence was not free from doubt, and when the result reached in the Surrogate's Court was not entirely satisfactory, the case should be reconsidered by a jury. (*Matter of Will of Ellick*, 19 Wkly. Dig. 231; *Matter of Hannah*, 11 N. Y. St. Repr. 807; *Reynolds v. Root*, 62 Barb. 250; *Matter of Pike*, 83 Hun, 327, 331, citing *Howland v. Taylor*, 53 N. Y. 627; *Matter of Lansing*, 17 N. Y. St. Repr. 440; *Van Orman v. Van Orman*, 34 id. 824. See, too, *Sutton v. Ray*, 72 N. Y. 482, 484.) * * *

"We are careful to say that this reversal, which is made necessary by our conclusion, does not indicate, in our opinion, that the learned and able surrogate positively erred in the result reached by him, but merely that such result on the evidence adduced before him and contained in the record now before us is not entirely satisfactory to this court."

Hence, the burden which rests upon the probate court is to be discharged under the menace of a rule which controls the appellate court even though it finds that no error is assigned and that the trial judge's conclusions are supported by the evidence and are not against the weight of evidence. It may be, as it often has been, that the court sitting in review may commend every step taken upon the trial and may concede that no other step could in justice have been taken; it may even confess that the result has not only been according to the law as administered by an enlightened mind, but probably right, yet, because of an undefined caution, a vague sense that the result is "not free from doubt," the same court, vaguely doubting and

vaguely "dissatisfied" will direct another trial without any assignable basis in the record.

Thus, a determination rendered upon conscience under the constraint of fixed and well-known rules which would not permit of any other result may properly be set aside by the application of another set of rules neither of the same nor of like effect as those which compelled the original result. Both judgments may be right, though repugnant, for the surrogate was bound by duty and oath to find against the will and, therefore, did right, while under the same just duress the other court in reaching the other result equally does right.

The latter court must reverse the decree for "doubt," while the trial court is forbidden to doubt and is sworn to resolve all hesitation. One court cannot lawfully base its decision upon doubt; the other, in the same case, must.

There is no other aspect of litigation known to this state where the rule applicable upon the trial differs from the rule upon appeal. In appeal from the humblest court and in every issue carried up from the Surrogate's Court except a case of probate, the inquiry is, "Where is the error either in the progress of the trial or in the final disposition?"

It is not the result of this procedure which is unfortunate, for few will deny the expediency of submitting to a jury the complex and sacred interests which are frequently involved in a will contest. There can be no question of the duty of the appellate court to send these cases down for jury trial, for the court itself is bound upon the wheel of the present system and must follow its dizzy revolutions.

The mischief is in the mechanism itself which takes courts and litigants with it in its irrational round.

Where the instinct of the law has broken beyond the confines of its own methods to do righteousness despite its own re-

straints, the course for justice should be made so that it need no longer break its way.

The present condition is an intellectual scandal, the butt of intelligent laymen as it is a shame of the profession. Its remedy is as obvious as its disorders. All of wisdom which it contains would be preserved and all of folly which it surely holds would be expelled if a trial by jury in the first instance were by statute made available upon seasonable demand. Then the abuses which have been remarked with Catonian iteration in former opinions of this court would abate and idle and humiliating tasks such as the present case imposes would be unknown.

The learned surrogate whose decision was reversed in *Matter of Tompkins*, *supra*, doubtless after he had given his best thought, and endeavor to a just and patient result, says: "Where the surrogate rejects probate upon the ground of the incompetency of the testator, and the record shows it to be a doubtful question, the appellate court will reverse and send the issue to a trial by a jury without indicating in any way its opinion upon the facts as disclosed in the record," and he then concludes, in view of sections 2622 and 2623 of the Code of Civil Procedure, as follows: "In view of the provisions of the Code, and of the authorities cited, I think the course to be pursued by a surrogate where the *factum* of the will is satisfactorily established, is to grant probate, unless want of testamentary capacity, fraud or undue influence is established beyond a reasonable doubt."

The opinion last quoted, so far as it would introduce into a civil case the rule that the issue should be determined by evidence establishing a given fact beyond a reasonable doubt is not accepted by this court, but the search for the fair preponderance of evidence, which is the only test, may well be made with a caution measured by the thought that if a jury trial is

desired by the contestant it can be had at once under section 2653a of the Code of Civil Procedure better than through the expensive and toilsome apparatus of appeal.

In the case at bar the evidence is wholly circumstantial and contains no direct view of the beneficiary in the act of unduly influencing the testator in making either his will or codicil, and both instruments may be admitted to probate.

Probate decreed.

Matter of the Judicial Settlement of the Account of LEWIS S. WAGMAN as Executor of the Estate of RACHEL WAGMAN, Deceased.

(Surrogate's Court, Saratoga County, June, 1913.)

EXECUTORS AND ADMINISTRATORS—JUDICIAL SETTLEMENT OF—ACCOUNTING—ANNUITIES—WHO ENTITLED TO SHARE IN ESTATE.

Where by her will, which because of defective execution of waivers of citation was re-probated, testatrix, after giving from the principal of her estate an annuity and a legacy to different persons, bequeathed to her sister and another each one-half of the use and income of all her estate for life "upon the express condition that they pay each of the foregoing legacies," and after their death the rest of her estate was devised and bequeathed to her two brothers upon the same condition, and one of the executors under the supposed authority of the first probate paid the legacy, the annuity down to the time of the judicial settlement of his accounts, and until her death paid the bequest to testatrix's sister who appeared on the accounting by attorney and never appealed from the decree thereon, the contention of her executor, that because the residuary devisees and legatees did not personally pay the legacies, the residuary estate was left undivided and unbequeathed, and that the sister of the testatrix was entitled as an heir at law and next of kin to one-fourth of the estate which passed to her executor, will be overruled.

PROCEEDING upon the judicial settlement of the account of an executor.

Corliss Sheldon, for Lewis S. Wagman, executor.

Jesse Stiles, for John H. Raynor, contestant.

OSTRANDER, S.—Rachel Wagman died September 11, 1897, leaving a will, which was recorded in the office of the surrogate of the county of Saratoga on the 14th day of February, 1898, as having been duly proved. This probate was made as against John Wagman, Sarah Wagman Raynor and Nicholas Wagman upon the strength of a waiver of citation signed by them, but never acknowledged. Upon discovery of this omission the will was again duly admitted to probate on the 13th day of January, 1912. The will named Lewis S. Wagman and Nicholas Wagman as executors, but Lewis alone qualified. The will provided for payment of an annuity of twenty dollars to Laura A. Losee, also a legacy of \$200 to be paid to Flora Wagman from the principal of the estate, two years after the death of the testatrix.

By the third clause testatrix bequeathed to her sister, Sarah Wagman, afterwards Sarah Wagman Raynor, one-half the use and income of all her estate during the natural life of said Sarah.

By the fourth clause testatrix bequeathed one-half of the use and income of all her property unto Lewis S. Wagman during his natural life.

By the fifth clause, she provided that this "devise and legacy" to said Sarah and to said Lewis was made "upon the express condition that they pay each of the foregoing legacies."

By the sixth clause, she gave, after the death of said Sarah and said Lewis, the rest of her estate to her brothers, Nicholas

and John Wagman, further providing that this "devise and legacy" to Nicholas and John was "upon the express condition that they pay each of the foregoing legacies."

Under the supposed authority of the first probate proceedings, Lewis Wagman, executor, proceeded with the administration of the estate. He paid Laura Losee twenty dollars per year down to the time of this proceeding. He paid Flora Wagman her legacy out of the principal of the estate. He paid Sarah Wagman Raynor the income of one-half of the estate down to the 1st day of July, 1912, and files several vouchers covering the period from Rachel's death down to July 1, 1912, in which Sarah Wagman Raynor receipts to him for divers sums in full for her one-half of the income of said estate up to said several dates, the last being July 1, 1912. Sarah Wagman Raynor died January 20, 1913.

On January 29, 1912, a decree was entered in the Surrogate's Court, after due citation of Sarah Wagman Raynor, judicially settling the account of the executor. Such account included the receipts and disbursements of said Lewis S. Wagman, and his payment of said annuities and income accounts to Laura Losee, Flora Wagman and also to Lewis S. Wagman and Sarah Wagman Raynor up to April 1, 1911. Said Sarah appeared upon this accounting by attorney and never appealed from the decree.

It is undisputed upon this hearing that John Wagman, Nicholas Wagman, Lewis S. Wagman and Sarah W. Raynor did not personally pay the legacies to Laura Losee and Flora Wagman, and that John and Nicholas did not personally pay the legacies to Lewis and Sarah. Upon this state of affairs the contestant, Raynor, as executor of Sarah Wagman Raynor, claims that John Wagman and Nicholas Wagman, by reason of their failure to personally pay said legacies, forfeited their right to the residuary estate, and that

the residuary estate was therefore left undivided and unbequeathed, and that it thereupon vested in Sarah Wagman Raynor, John Wagman, Nicholas Wagman and Lewis S. Wagman, as heirs at law and next of kin of the deceased, and that Sarah Wagman Raynor became entitled to one-fourth thereof which passed to the contestant.

I do not perceive in what manner the interest of Sarah Wagman Raynor, or her estate, could have been bettered by the payment of these other legacies by John and Nicholas Wagman personally. The only effect of such payment by them would have been

(a) To increase the income payable to her to the extent of one-half of the income on twenty dollars payable annually to Laura Losee and

(b) To increase the amount of the estate which would be finally received by John and Nicholas, and none of which would go to Sarah Wagman Raynor. She received and receipted for all the income of the estate down to July 1, 1912. From that time Rachel's executor seeks to account to her estate for the income down to the time of her death.

No one objects to this account except Mr. Raynor.

If the executors had not paid the twenty dollars annually to Laura Losee out of the corpus of the estate, there would have been one-half of this amount, or ten dollars annually from which said Sarah would have been entitled to the income. But it does not appear that this ten dollars could have been invested so as to produce any substantial income above the expenses of its investment, and inasmuch as she was a party to the settlement of the executor's accounts down to the 1st day of April, 1911, by a decree made with her acquiescence, and as she acknowledged the receipt of all her share of the income down to July, 1912, I think it must be presumed that she assented to and was bound by the amount of income which was paid to her

by the executors as being the full amount of her share of the income receivable from the estate. It is patent therefore that the estate of Sarah Wagman Raynor has not suffered, so far as her income is concerned, and, if the exact payments which she contends should be made by John and Nicholas Wagman had been made by them, her estate would be in no more favorable condition than it is at present.

Now as to the claim of forfeiture by reason of the failure of Nicholas and John to personally pay these legacies.

The payment of the legacies out of the estate simply acted to deplete the amount which would be finally received by Nicholas and John from the estate. They acquiesced upon this accounting in those payments, and in effect have paid the legacies with which they were charged. The intent of the will was, I think, that Laura Losee should receive her annuity; that Flora Wagman should receive her legacy; that Lewis and Sarah should each receive the life use of half of the estate; that the balance should be divided between Nicholas and John. These wishes have been substantially complied with, and no forfeiture has been worked of the shares given to John and Nicholas.

The objections of the contestant must therefore be overruled. The executor should pay to the contestant, Raynor, the one-half of the income of the estate from July 1, 1912, to January 20, 1918, and the balance of the estate should be held by the executor for the use of said Lewis, Nicholas and John in accordance with the provisions of the fourth and sixth paragraphs of the will.

Taxable costs of the contest should be paid by John H. Raynor, personally.

Decreed accordingly.

James McCarthy, \$1,419.90, with interest from February 3, 1913.

Impervious Products Co., \$110, with interest from February 3, 1913.

Thomas F. Howden, doing business as the Howden Tile Company, \$148, with interest from —.

J. I. Hass, Inc., \$110, with interest from February 4, 1913.

A. J. Corcoran, Inc., \$200, with interest from February 5, 1913.

Requests to find so far as presented have been passed upon. Settle findings in accordance therewith and as indicated in this opinion and decree upon notice.

Judgment accordingly.

Matter of the Judicial Settlement of the Accounts of ELMER E. DUNCAN, WILLIAM C. KELDERHOUSE and ALICE E. DOYLE, as Executors of the Estate of JOHN KELDERHOUSE, Deceased.

(Surrogate's Court, Erie County, July, 1913.)

**EXECUTORS AND ADMINISTRATORS—WHEN NOT ENTITLED TO COMMISSIONS *
—WILLS—POWER OF SALE BY EXECUTORS.**

Where it becomes unnecessary to exercise a power of sale by executors of their testator's real estate, the personal property being ample to pay all bequests and an annuity to testator's widow, and the residuary legatees and devisees give written notice of their election to take the realty free from any and all powers of sale given to said executors, they are not entitled to commissions on the unsold realty, in the absence of an actual sale.

* See Note Mills Surr., Vol. V, p. 203.

JUDICIAL settlement of executors with application for commissions on unsold realty in controversy.

Albert C. Spann for Alice E. Doyle.

Charles C. Farnham (Simon Fleischmann, of counsel), for Elmer E. Duncan and William C. Kelderhouse.

Kenefick, Cooke, Mitchell & Bass for Mabel R. Anderson and Harriet Drake Baker, residuary legatees.

HART, S.—The will of John Kelderhouse, the testator, was probated in this court on July 27, 1911. Letters testamentary were issued to Elmer Duncan, Wm. C. Kelderhouse and Alice E. Doyle. The widow is given the homestead and contents for life, with reversion to residuary estate, and an annuity of \$5,000 payable in quarterly instalments. Bequests of \$7,000 are made to collateral relatives, friends and employees, and \$2,000 to the Young Women's Christian Association. The residue of "every kind and nature and wheresoever found," is bequeathed to the executors in trust, for his nieces, Jennie K. Doyle, Alice E. Doyle and Grace H. Doyle, Mabel R. Anderson and Harriet T. Drake, share and share alike. The widow, Jane Kelderhouse, died on December 11, 1911, her annuities have been paid in full, the executors have filed their account showing a balance on hand of cash and personal property amounting to nearly \$67,000. A contested claim of \$12,000 only remains for the completion of executorial duties before final distribution of the estate. The only other persons interested in the estate are the residuary legatees and devisees, and this accounting is only in controversy as to the amount of executors' commissions as being applied to the unsold real property, the value of which was estimated by the transfer tax appraiser to be the

sum of \$814,404, no part of which has been disposed of excepting a small parcel inventoried at \$175.

The application for commissions on the unsold realty is made in behalf of two of the executors; Alice E. Doyle, as executor and residuary legatee, opposing the allowance.

Under the sixth clause of the will, the residue of the estate, real and personal, is given to the executors in trust for his nieces, and the executors claim that this language necessarily works an equitable conversion of his estate, and that it must be treated as personal property in determining the question of commissions. The cases cited (*Power v. Cassidy*, 79 N. Y. 602; *Lent v. Howard*, 89 id. 169) in neither instance is an imperative sale directed by will, and the duties of the executors differ substantially from those in the present case in their range and scope. The executors of this will are given a power of sale which has not been exercised, the personal property being ample to pay the annuity to the widow for the short time she survived her husband. To constitute equitable conversion of real estate into personalty in the absence of actual sale, the power of sale as expressed in the will must be absolute and imperative. The words "executor" and "trustee" are used interchangeably by laymen in drawing wills and legal documents, and the use of the word "trust" need not necessarily create or complicate the administration of an estate when construction is sought, nor will execution of a trust be denied in the absence of definite and exact words expressing the trust, but on the contrary will be construed by implication. A cardinal rule of construction that "the intention of the testator should govern if not contrary to statute" applied to the present case seems to indicate that the executors were granted a power which was unnecessary to exercise; to interpret his attention and extend this power into a trust, for the mere purpose of granting commissions, would appear to be a strained

construction and interpretation of testator's intention. *Cooke v. Platt*, 98 N. Y. 35; *Matter of Hardenbrook*, 23 Misc. Rep. 538.

The residuary legatees and devisees gave written notice of their election to take the realty of the testator free from any and all powers of sale given to the executors; the same plan as adopted by the devisees in *Trask v. Sturges*, 170 N. Y. 482, availing themselves of the holding that by this process the power of sale was extinguished; also held in *Train v. Davis*, 49 Misc. Rep. 169, "Where land is directed to be turned into money under a power and paid over to designated persons, and these persons are of lawful age, and, upon the sale of the land, at once entitled to the money, they may elect to take the land; and when they have so elected and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished and he cannot thereafter lawfully proceed to execute the power. This doctrine arises from the principle that equity will not compel the execution of a trust against the wishes of the persons beneficially interested."

In my opinion the executors have failed to present a case in law or equity justifying the construction of the will awarding them commissions on the unsold realty.

A decree may be entered passing the accounts of the executors, and allowing commissions only upon the personal property.

Decreed accordingly.

Matter of the Estate of FRANK WAYLAND HIGGINS, Deceased.

(Surrogate's Court, Cattaraugus County, July, 1913.)

TRUSTS—DIRECTION TO TRUSTEES TO PAY INCOME TO RESPECTIVE BENEFICIARIES—CONTRACT BETWEEN TESTATOR'S WIDOW AND SON TO PREVENT THE CONVERSION OF RESIDUARY ESTATE INTO MONEY—CODE CIV. PRO., § 2472a—JURISDICTION TO CONSTRUER—ASSIGNMENT AND AGREEMENT—TURNING OVER TO A HOLDING CORPORATION OF SECURITIES CONSTITUTING TRUST FUND.

A will aside from certain general legacies created distinct trusts of \$50,000 each for testator's widow and his three children who were all of full age, and the trustees were directed to pay the income of each of said trusts to the respective beneficiaries, and the residue of the estate was given to the widow absolutely who, three years after the probate of the will, made an absolute assignment of a two-ninths interest in the entire residuary estate to one of testator's sons, a resident of the state of California. A written contract between the widow and said son, reciting that they were desirous of preventing the conversion of the residuary estate into money, expressed a wish that the executors should not exercise their power of sale over the real estate nor their authority for the disposition of the personal securities but that they should transfer the same to a holding corporation formed to create a method of preserving and holding intact the residuary estate, and said contract made no distinction between the trust fund for the widow and that portion of the residuary estate which had actually come into her possession, but provided that it was mutually covenanted and agreed between the parties that all the property and estate, both real and personal, should belong to and become a part of the residuary estate and be transferred to the holding company. The son's wife, by a writing at the end of said contract, approved thereof and agreed to join with him in the execution of any deed necessary to make the contract effective and for the purpose of conveying any contingent right of dower she might have in the property. The son subsequently died in California leaving him surviving beside his widow two minor children, and upon the probate of his will in that state letters testamentary were issued to his widow. In a controversy between her and her husband's mother as to the

title to the trust fund for the benefit of the latter, held, that under section 2472a of the Code of Civil Procedure, as amended, the surrogate upon an intermediate accounting of the testamentary trustees had jurisdiction to construe both the assignment and the agreement and to determine in whom was the title to the trust fund.

That upon the execution of said assignment, which was made without any other consideration than love and affection, the son became the absolute owner of an undivided two-ninths in the principal of the trust fund.

That the agreement between mother and son, which was fully consummated in every detail before his death, except the formal transfer of the funds constituting the trust estate so soon as the same were released from the operation of the trust, did in fact provide for a transfer to the holding corporation of the two-ninths interest assigned to the son, and the demand of his executrix for payment thereof to her was neither just, equitable nor conscionable.

That the transfer of the son's interest in said trust fund was effected by the agreement between him and his mother, and all that remained to be done after his death in order to effect a complete performance of said agreement was the turning over to the holding corporation of such securities as constituted the trust funds; that it was not necessary for the executrix of the son to execute any formal transfer of the two-ninths of the trust fund to the corporation, as by the agreement the son had parted with and surrendered his right to the possession of any portion of such securities and had agreed to accept stock in the holding corporation equivalent to and in lieu of his two-ninths interest in the same, and his executrix was not entitled to recover anything more.

That the separate trust for the benefit of the said son having expired at his death should be delivered by the trustees to the holding company.

That income derived from the trust for the benefit of said son prior to his death and not paid over to him should be paid by the trustees to his executrix, and income derived since the death of said son should be paid by the trustees to the holding corporation.

PROCEEDINGS on intermediate judicial settlement of the accounts of N. V. V. Franchot, Frank L. Bartlett and Frank Sullivan Smith as testamentary trustees.

Hastings & Larkin for accounting trustees.

John K. Ward for widow, Kate C. Higgins, F. Harrison Higgins, Josephine Higgins Hovelaque and The Higgins Company.

Edgar G. Pratt for Elizabeth B. Higgins individually, and as Special Guardian for Katherine H. and Lucia C. Higgins, Infants.

Phillip Carpenter for Elizabeth B. Higgins as Executrix of the Last Will and Testament of Orrin Thrall Higgins, deceased.

DAVIE, S.—Frank Wayland Higgins, late of the city of Olean, died in February, 1907, leaving a will dated August 6, 1904, which was admitted to probate February 18, 1907; letters testamentary were thereupon issued to N. V. V. Franchot and Frank L. Bartlett, the executors therein named, who have fully administered upon the estate and procured a final judicial settlement of their accounts as such executors on the 18th day of November, 1908.

The testator left him surviving his widow, Kate C. Higgins, two sons, Orrin T. and F. Harrison Higgins, and one daughter, Josephine Higgins Hovelaque, all of full age, his only heirs at law and next of kin. The son Orrin, being a resident of California, died September 12, 1912, leaving a will, which was duly admitted to probate in that state, and letters testamentary were issued thereon to his widow, Elizabeth B. Higgins. He left him surviving, besides his widow, two minor daughters, Katherine H. and Lucia C. Higgins.

Aside from several general legacies, the will creates six distinct trusts, one of \$50,000 for the widow and each of the three

children, one of \$4,000 for the benefit of Emily Higgins, one of \$10,000 for the maintenance and beautifying of the public park in the city of Olean on the north side of the Higgins homestead. The petitioners, Franchot, Bartlett and Smith, were appointed trustees and the executors were directed to set apart and turn over to them, as soon as practicable, from the funds of the estate, a sufficient amount to constitute the trusts so provided for, which was accordingly done. The income derived by the trustees from the investment of each of the \$50,000 trusts was directed to be paid by them to the respective beneficiaries during their lives. The residue of the estate was given to the widow absolutely.

On the 21st day of May, 1907, Kate C. Higgins, the residuary legatee, executed, acknowledged and delivered to the son Orrin T. an instrument in writing, of which the following is a copy:

"KNOW ALL MEN BY THESE PRESENTS, that Whereas, I, Kate C. Higgins of Olean, in the State of New York, am possessed of an estate as residuary legatee and devisee of my late husband, Frank Wayland Higgins, which I am desirous of settling in part on my son, Orrin Thrall Higgins, in order that he and his issue may to some extent be provided for out of the estate of his late father.

"Now, I, the said Kate C. Higgins, in consideration of the love and affection which I bear to my said son, and in further consideration of the sum of One Dollar (\$1.00), lawful money of the United States, to me paid before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, do bargain, sell, assign, transfer and set over unto my said oldest son, Orrin Thrall Higgins, two-ninths of the residuary estate which came to me from his father, the late Frank Wayland Higgins, whether such residuary estate be real, personal or mixed, my intention being that my said son Orrin

Thrall Higgins, shall be vested now and at the present time by virtue of this instrument, with two-ninths of the said residuary estate, to have and to hold the said two-ninths unto the said Orrin Thrall Higgins, his executors, administrators and assigns forever.

"I further covenant to and with the said Orrin Thrall Higgins that I will, pursuant to the premises, make, execute and deliver any further deeds, covenants and conveyances which may be requisite or necessary, in law or in equity, effectually to vest in him or his heirs or assigns the title to his portion of the real estate received by me as residuary legatee, aforesaid, and hereby intended to be transferred and set over unto him.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this 21st day of May, in the year of our Lord 1907.

"KATE C. HIGGINS [L.S.]

"In presence of

"HARRY A. HINCKLEY, *Notary Public.*"

On the 25th day of November, 1908, the widow, Kate C. Higgins, and the son Orrin entered into a contract in writing, reciting the making of the assignment above quoted, and further stating that it was not desired or deemed advisable for the executors to exercise the power of sale given them by the will or to convert the stocks and securities constituting the residuary estate into money, but that they should turn the same over as specified in such agreement, and further reciting that the said parties were then procuring the organization of a corporation under the laws of the state of Minnesota to be known as the Higgins Company, with an authorized capital stock of \$500,000, and that the province and functions of such corporation were to "take, acquire, own and hold all of the residuary property and estate which shall come to the parties hereto under said will, it being deemed to be advisable by the parties hereto that

such property should remain and be kept intact for the present," and which said agreement, after such recitals, contained the following provision:

"Therefore, for a valuable consideration by each to the other in hand paid, the receipt whereof is hereby acknowledged, it is mutually covenanted and agreed between the parties hereto that all of the property and estate, both real and personal, which shall belong to and become a part of the residuary estate under the twenty-second paragraph of the will of the said Frank W. Higgins shall be jointly by the parties hereto, or by the said executors, transferred or conveyed to the said Higgins Company, and in payment therefor the parties hereto shall accept and take capital stock of the said Higgins Company, the party of the first part, to have and receive seven-ninths and the party of the second part to have and receive two-ninths of such capital stock, as representing her or his interest in the property so transferred and conveyed, and either party hereto shall, upon request of the other, execute all such writings, transfers, conveyances or assignments as may be necessary to so transfer or convey such interest, and to carry into effect the terms of this agreement. This agreement shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto."

The wife of the son Orrin, by a writing at the end of such agreement, approved of the same and agreed to join with her husband in the execution of any deed necessary to carry such agreement into effect, and for the purpose of conveying any contingent dower right she might have in such property.

The incorporation of the so-called Higgins Company was perfected by the filing of the requisite certificate in the office of the secretary of state of the state of Minnesota, November 10, 1908, and in the office of the register of deeds of St. Louis county, Minnesota, November 11, 1908, pursuant to the pro-

visions of chapter 58 of the Revised Laws of the state of Minnesota for the year 1905. The incorporators named in the certificate were Kate C. Higgins, Orrin T. Higgins, Frank L. Bartlett, N. V. V. Franchot and Allen B. Williams, who also constituted the first board of directors. Thereupon, all of the real estate belonging to the residuary estate was duly conveyed to the Higgins Company and all the securities, aside from those set apart to create the several trust funds, were actually delivered and turned over to the corporation; a single share of stock was issued to each of the directors, Franchot, Bartlett and Williams, for the sole purpose of qualifying them to act as directors and such portion of the balance of the capital stock as the parties deemed expedient in the proportion of two-ninths and seven-ninths was issued and delivered to Orrin and Kate C. Higgins, respectively, the balance of the capital stock being retained and held in the nature of treasury stock.

It is asserted on behalf of the residuary legatee that the assignment of May 21, 1907, did not transfer to Orrin T. any interest in the principal of this trust fund; that it only gave to him an undivided two-ninths interest in such portions of the residuary estate as were then actually in the possession and under the control of the residuary legatee. On the contrary the executrix of the Orrin T. Higgins will claims that by virtue of such assignment her husband became the owner of a two-ninths interest in this fund and that such interest was not transferred to the Higgins Company by the contract of November 25, 1908, and that she is now entitled to such interest in money. These are the questions for determination upon this accounting. They must be determined in order to make the proper disposition of the securities constituting the trust fund. These conflicting claims can only be determined from a construction of the two contracts above referred to in connection with the provisions of the will of the decedent. Has the Sur-

rogate's Court jurisdiction upon this accounting to make such construction?

The Surrogate's Court is one of limited jurisdiction. It possesses no powers or authority other than those specifically conferred or necessarily inferentially granted. Section 2472 of the Code of Civil Procedure defines the general jurisdiction of the Surrogate's Court and section 2481 specifies in detail its incidental powers. It has been frequently held that under the provisions of these two sections the Surrogate's Court had no jurisdiction to determine controversies of the character suggested, such questions being exclusively within the province of a court of general jurisdiction. *Matter of Union Trust Co.*, 175 N. Y. 304; *Matter of Wagner*, 119 id. 28.

But section 2472a of the Code was enacted and became operative September 1, 1910, providing as follows: "The surrogate's court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same." What is the meaning and scope of this new section?

In statutory construction where the phraseology of the act is ambiguous and indefinite, the legislative intent must be derived not only from the phraseology itself but from the surrounding circumstances and conditions inducing the legislation. Statutes should be constructed and interpreted according to the nature and most obvious import of the language employed without resorting to strained or forced construction for the purpose of limiting or enlarging their operation, having in mind the pur-

pose evidently sought to be accomplished. In the past much delay and serious inconvenience in the administration of estates have been experienced in consequence of the limited powers of the Surrogate's Court; conflicting claims to distributive shares have often arisen, making it necessary to delay proceedings in that court to await the ultimate determination of such controversies by a court of general jurisdiction. This situation has occasioned multiplicity of litigation, increased expense, vexatious procrastination and accentuated the necessity for conferring upon Surrogate's Courts the same power and authority possessed and exercised by the former Chancery Courts in their supervision of the administration of decedents' estates. The tendency of modern legislation has been to meet this demand to some extent. Year after year the jurisdiction of Surrogates' Courts has been enlarged. For illustration, by the provisions of chapter 595 of the Laws of 1895 these courts were given jurisdiction to hear, try and determine disputed claims against estates upon the stipulation of the parties. By the amendment to section 2624 of the Code these courts were authorized, in connection with the probate of a will, to determine the validity, construction and effect of any provision of the will, whether it related to real or personal estate. Many other instances might be cited.

It must be conceded that it was the design of the legislature in the enactment of section 2472a to enlarge to some extent the then existing jurisdiction of Surrogates' Courts. In construing the phraseology of this section it is evident that it is somewhat inartistically drawn. Standing alone it might be difficult of interpretation and application. The use of the word "ascertain" in the first paragraph is somewhat unfortunate. The word "ascertain," in its commonly accepted signification, means simply to become apprised of the existence of an undisputed fact, and in this instance to learn who the conceded legatees

and distributees were. Surrogates' Courts have always possessed that power as a necessary incident to distribution. It was evidently the intent to give these courts by the provisions of this new section some greater authority than that of merely ascertaining some existing fact. It has used the term "ascertain" as equivalent to "hear, try and determine," and for that purpose it is provided that the Surrogate's Court "shall exercise all other powers, legal and equitable, necessary to a complete determination of the matter," and, in order that the provisions of this act should not contravene any constitutional right of trial by jury, the concluding sentence provides for a jury trial in a proper case, when seasonably demanded. The precise scope of this new legislation, however, is a subject of controversy. The Law Reform Association of the city of New York maintains that its effect is to give to Surrogates' Courts the right "to exercise all powers, legal or equitable, necessary to the complete disposition of the accounting." (N. Y. L. J., April 28, 1911.) On the contrary, in *Matter of Clyne*, 72 Misc. Rep. 593, the surrogate holds that the only additional power conferred by his section is the right to determine the title to a legacy or distributive share, to set off a debt against the same, to ascertain whether the debt exists so as to affect the accounting party with a constructive trust in regard to the same. The words "shall exercise all other powers, legal and equitable," etc., are not susceptible of general application, but relate simply to the determination of the title to a legacy or distributive share and the offsetting of debts against the same.

In *matter of Cary*, 77 Misc. Rep. 602, the question involved was the determination of the validity of a contract for voluntary settlement and distribution of the assets of the estate, entered into between the executor and the residuary legatee, where the latter asserted that the execution of such contract was procured through fraudulent representations in regard to the extent of

the estate. The Surrogate's Court held that under the provisions of section 2472a it had power to determine that question. Other questions were involved in that case, and, while the decision of the surrogate was affirmed by the Appellate Division, such affirmance was without opinion and, therefore, affords no light upon the question of the construction of this new section.

Without entering upon any academic discussion of the possible general scope of this new section, it will be held that for the purposes of this accounting the Surrogate's Court has jurisdiction to construe the two contracts in controversy and to determine who now holds the title to this trust fund.

Did the assignment of May 21, 1907, above quoted, transfer to Orrin T. Higgins any interest in the principal of this trust fund?

It is strenuously insisted on the part of the residuary legatee that it was not her design or intention in executing this voluntary transfer to her son to give him any interest in the principal of the trust fund of which he was then enjoying the income, or in the principal of either of the other trusts created for the benefit of the other children; that the purpose of such assignment was to transfer a two-ninths interest in that portion of the residuary estate which had then come into her possession and under her control, and nothing more; and in this connection attention is called to the following phraseology of the first paragraph of the will: "Upon the death of any child the principal fund of \$50,000.00 so set apart for the use of the one so dying *shall become* a part of my residuary estate."

The difficulty with such condition, however, arises from the fact that the legal signification of the term "residuary estate" has become well understood and it must be assumed that the testator knew the meaning of the term when he employed it in his will and that Mrs. Higgins comprehended its import when she used it in the assignment. The will provides that: "all the

rest and remainder of my property of whatever name, nature or kind, I give, devise and bequeath unto my wife, and I do further direct and declare that the several principal sums or trust funds which have been herein directed to be set apart shall constitute a part of the residuary estate unless otherwise directed, and be paid to the residuary legatee and devisee upon the happening of the event which shall terminate the rights of the beneficiaries to the use and income of such principal sums respectively, and I hereby declare such residuary legatee and devisee to have a vested right and interest in and to such principal sum immediately upon my decease, subject, however, to the use and income as hereinbefore provided."

The title to the principal of this fund was not held in abeyance or given to trustees, but vested absolutely in the residuary legatee upon the death of the testator and the probate of his will; it was bequeathed directly to her in her capacity of residuary legatee. Her title to the principal is not impaired by the fact that the earnings of this fund were to be paid to the son during his lifetime. The provisions of the assignment are extremely specific, certain and definite. It transfers to the son absolutely a two-ninths interest in the entire residuary estate, of whatever it might consist, whether real, personal or mixed. In view of the specific characterization by the testator of the principal of this fund as a part of his residuary estate, and in view of the fact that the provisions of the assignment apply to every portion of the residuary estate, whether in possession or reversion, no substantial reason can be discovered for sustaining the contention of the residuary legatee in the particular mentioned. It must accordingly be held that upon the execution and delivery of the assignment the son became the absolute owner of an undivided two-ninths interest in the principal of this \$50,000 trust fund.

The remaining question relates to the effect of the contract

of November 25, 1908. Does that contract provide for the transfer of the two-ninths interest in the trust fund to the Higgins Company?

It is apparent from the recitals in this agreement that both Kate C. and Orrin T. Higgins were desirous of preventing the conversion of the property constituting the residuary estate into money. They express a wish that the executors should not exercise their power of sale over the real estate, nor their authority for the disposition of the personal securities, but that they should transfer the same to the holding corporation—The Higgins Company. The object of the formation of the corporation was to create a method of preserving and holding intact the valuable properties and securities constituting the residuary estate. All these considerations applied to the securities constituting the trust fund as well as to the other portions of the residue. The agreement, by its terms, makes no distinction between the trust fund and that portion of the residuary estate which had then actually come into the possession of the residuary legatee. It must be held that this agreement, providing as it does, that, "it is mutually covenanted and agreed between the parties hereto that all the property and estate, both real and personal, which shall belong to and become a part of the residuary estate" should be assigned to the Higgins Company, does in fact provide for a transfer of Orrin T. Higgins' two-ninths interest in this \$50,000 fund, and that such agreement had been fully consummated in every detail prior to the death of Orrin T. except the formal transfer of the funds constituting the trust estate as soon as the same were released from the operations of such trust.

When we consider the fact that this two-ninths interest in the large residuary estate approximating in value nearly \$1,000,000 was given to the son Orrin T. without any other consideration than that of love and affection and that he volun-

tarily became a party to the contract of November 25, 1908, for the sole purpose of conserving and protecting the residuary estate, it can hardly be said now that the position of the executrix of his will in demanding payment of the two-ninths of this residuary estate to her in money is either just, equitable or conscionable. The proposition is axiomatic that equity will consider that done which ought in good faith to be done. It is not necessary for the executrix of the Orrin T. Higgins will to execute any formal transfer of this two-ninths interest of the trust fund to the Higgins Company. Such transfer was effected by the contract of 1908. All that remained to be done after the death of Orrin T. in order to effect a complete performance of that contract in every detail was the turning over to the corporation of such securities as constituted the trust fund. By the provisions of that contract Orrin T. had parted with and surrendered his rights to the possession of any portion of the securities constituting the trust fund and agreed to accept stock of the Higgins corporation equivalent to and in lieu of his two-ninths interest in the same. Such stock is all that he could have demanded or recovered at any time after the execution of such agreement, and his personal representative is not entitled upon this accounting to recover anything more.

It is, however, vigorously asserted on behalf of the executrix of the Orrin T. Higgins will that the Higgins Company was not a party to the agreement of November 25, 1908; that no privity exists in consequence of such agreement, between the corporation and Kate C. or Orrin T. Higgins or his legal representative, and that the corporation has no standing in this proceeding to enforce performance of this agreement, and in this connection numerous authorities are cited, especially *Embler v. Hartford Steam Boiler Ins. Co., etc.*, 158 N. Y. 431, where it is said: "Under the rules of the common law, giving a right of action upon the engagement or promise of a party, the cause of

action is vested in the person with whom, or to whom, the engagement, or the promise, is made. An exception is allowed in the case of a third party, for whose benefit a contract is made; when he may be allowed to bring an action in his own name. In such a case, however, it must appear that, when the contract was made, some obligation, or duty, was owing from the promisee in the contract to the party to be benefited. It is not sufficient that the performance of the contract may benefit a third person. It must have been entered into for his benefit and the promisee must have a legal interest that it be performed in favor of the third person."

Also *Rosseau v. Rouss*, 180 N. Y. 116, where it is said: "Unless she (the plaintiff) had an interest in the performance of the contract there was no consideration therefor, as a promise for the benefit of a third person must not only be supported by a sufficient consideration but the one furnishing it must have a legal interest in the performance of the promise."

In each of these cases, as well as in the other cases cited, the action was brought by the third party to enforce for his own benefit the provisions of a contract to which he had never become a party, but these authorities have no application to the present controversy. The Higgins Company is not an active litigant in this proceeding. No necessity existed for citing it upon this accounting. Its attitude is simply that of a recipient of such sums as may be turned over to it pursuant to the contract of November 25, 1908. The actual controversy is between Kate C. Higgins and the representative of the Orrin T. Higgins estate.

The purposes for the organization of the Higgins Company have already been referred to. They are set forth specifically in the agreement of November 25, 1908. It was organized merely as a holding company for the purpose of managing and conserving the residuary estate of which Kate C. owned seven-

ninths and Orrin T. the other two-ninths. They were the only persons interested and the owners of the capital stock. No other interests have intervened and no stock of the corporation has been issued to any other parties, aside from nominal amounts in order to properly qualify the requisite number of directors of the corporation. The corporation has no assets other than the property constituting the residuary estate. The entire transactions had between the executors, Kate C. and Orrin T. Higgins after the making of the agreement of 1908 relating to the residuary estate were so had for the purpose of consummating such agreement in every particular.

The corporation was perfected November 11, 1908, and on December first of the same year the executors transferred to Kate C. and Orrin T. property of the value of \$429,666. Kate C. and Orrin T. immediately thereupon transferred the same property to the corporation. In order to make the stock fully paid for in cash the corporation issued and delivered to Kate C. its check for \$334,180 and likewise its check to Orrin T. for \$95,480. Thereupon Kate C. and Orrin T. immediately executed and delivered to the company their respective personal checks for like amounts and received in exchange therefor, Kate C. Higgins 2,156 shares and Orrin T. Higgins 616 shares. Thereupon Kate C. transferred one share of her stock to each Allen B. Williams, Frank L. Bartlett and N. V. V. Franchot, for the purpose of qualifying them to act as directors. On the 11th day of January, 1909, the executors transferred to Katie C. and Orrin T. other property of the aggregate value of \$188,325, and on the same day Kate C. and Orrin T. transferred the same identical property to the Higgins Company. The company thereupon issued and delivered to Kate C. its check for \$146,475 and to Orrin T. its check for \$41,850. They each in turn, on the same day, drew their respective personal checks

to the company for like amounts and thereupon 945 shares of the capital stock were issued to Kate C. and 270 to Orrin T.

On the 22d day of October, 1910, the executors transferred to Kate C. and Orrin T. Higgins, 400 shares of the capital stock of the Exchange National Bank of Olean for \$84,000, and on the same day Kate C. and Orrin T. transferred this stock to the Higgins Company and thereupon the corporation issued to Kate C. its check for \$65,333.33, and to Orrin T. its check for \$18,666.67, and they in turn issued and delivered their checks, respectively, to the corporation for like amounts. The total authorized capital stock of the corporation was \$500,000 and \$450,000 of such stock was issued to Kate C. and Orrin T. as above stated.

Thereafter the executors transferred directly to the corporation \$227,250 worth of other property, for which the corporation paid the executors directly, and the executors have accounted for the same upon their judicial settlement, and it does not appear that any of the capital stock of the corporation was issued to either Kate C. or Orrin T. in consequence of the last mentioned transfer of assets.

The above facts are referred to for the purpose of explaining the details of the various transactions resorted to by Kate C. and Orrin T. Higgins and by the executors for the purpose of carrying into effect the provisions of the contract of 1908, and it will be seen that \$50,000 of the authorized capital stock of the corporation has not yet been issued, but is held by the corporation as treasury stock, and in view of the fact that Kate C. and Orrin T. Higgins were the owners of the entire capital stock of the corporation, it is of little consequence just what portion of the capital stock was actually issued to them, as their interest in the unissued or treasury stock is defined by the contract, that is, Kate C. seven-ninths and Orrin T. two-ninths. The capital stock issued to them represents the

entire assets of the corporation, aside from the nominal amounts issued to the directors, as above stated.

This review of the situation clearly shows that the contract of 1908 was not purely executory in its character; that in effect it did transfer to the Higgins Company the respective interests of Kate C. and Orrin T. in the entire residuary estate. It was fully executed in every detail, except as already stated, to the turning over of the assets constituting the trust fund in question, and the title to such trust fund was in effect transferred to the corporation by that agreement.

It must accordingly be held that both Kate C. and Orrin T. Higgins, by virtue of the provisions of the contract of 1908, had in effect transferred all of their interest in the residuary estate to the corporation, and that the \$50,000 remaining in the hands of the trustees and set apart as a trust fund for the benefit of Orrin T. Higgins, such trust having now expired in consequence of his death, should be delivered by the trustees to the Higgins Company.

It appears that a small amount of income had been derived from the trust fund prior to the death of Orrin T. Higgins which had not been paid over to him by the trustees. Such sum, as shown by the account filed herein, should now be paid by the trustees to the executrix of the Orrin T. Higgins will and the income which has been derived from the investment of said trust fund since the death of Orrin T. Higgins should be paid by the trustees to the Higgins Company.

No objections whatever are filed or made to the trustees' accounts of receipts and disbursements or to their proceedings in any particular. Accordingly, the decree to be made herein will provide that their accounts be judicially settled as filed.

Decreed accordingly.

Matter of the Estate of JOSEPHINE PENFOLD.

(Surrogate's Court, New York County, July, 1913.)

TAXES—TRANSFER—PROVISION FOR IMPOSITION OF TAX UPON THE RIGHT TO SUCCEED TO PROPERTY AND NOT UPON THE PROPERTY ITSELF—TAX LAW, § 220 (7).

Sections 220-245 of the Tax Law provide for the imposition of a tax upon the right to succeed to property and not upon the property itself.

Under the provisions of section 220(7) of the Tax Law, that a transfer tax shall be imposed upon the clear market value of property transferred by will or the intestate laws, the "clear market value" of the property of a decedent must be ascertained as of the date of his death, when the transfer takes effect; without any deduction of inheritance taxes imposed by other states upon the succession to shares of stock of corporations organized therein.

APPEAL from a decree of the Surrogate's Court fixing and assessing the transfer tax.

Mitchell & Mitchell for executor.

FRANK T. Warburton for Ladies' Helping Hand Association.

Daly, Hoyt and Mason for Bryson Day Nursery.

DeForest Brothers for Presbyterian Hospital.

Strong & Cadwalader for St. Mary's Free Hospital and for New York Association for Improving the Condition of the Poor.

Lexow, Mackellar & Wells for Five Points House of Industry.

Parsons, Closson & McIlvaine for New York City Mission and Tract Society.

Stanley W. Dexter for Children's Aid Society.

Stetson, Jennings & Russell for Grenfell Association of America.

W. H. Van Steenberg for Board of Foreign Missions R. C. A.

James R. Sheffield for Adirondack Cottage Sanitarium.

Richmond Weed for Home for Old Men and Aged Couples.

Harris & Towne for American Bible Society.

Thomas E. Rush for State Comptroller.

FOWLER, S.—The question which this appeal presents for determination is, whether the inheritance tax imposed by a foreign state upon the succession to property located in such state but transferred by the will of a resident of this state should be deducted from the market value of such property by the transfer tax appraiser designated to appraise the value of the estate for the purpose of the transfer tax in this state.

The decedent, who was a resident of this state, died in 1912. Among the assets of her estate were shares of stock in foreign corporations. The respective states in which these foreign corporations were organized, viz., Utah, Minnesota, Wisconsin and New Jersey, imposed a transfer tax upon the succession to the property represented by such stock. The executor of decedent's estate submitted to the appraiser a verified statement

showing the amount of tax imposed by the various foreign states upon the property of the decedent located in such states, and asked that the appraiser deduct such taxes from the market value of the stocks in ascertaining their value for purposes of taxation in this state. The appraiser refused to make the deduction, and the executor has taken this appeal from the order entered upon this report.

Whatever the personal opinion of a judicial officer may be concerning the policy of the taxing acts of the government which he represents—and I have not hesitated to express my own opinion on the general subject of taxation at the end of this opinion—he must apply the law as it is. I confess that it seems to me hard in principle that an abstraction, and not property, should be made the subject of taxation. To exact a tax in the last resort on property which has already been appropriated by a coordinate taxing power seems to me indefensible in principle; but if such is the law, and I think it is, it must be followed by me, regardless of my own theories or convictions.

In *Matter of Gihon*, 169 N. Y. 443, it was held that the amount of the federal inheritance tax assessed upon the succession to the property of a decedent should not be deducted from the assets of the estate otherwise taxable in this state. The appellant attempts to distinguish that case from the matter under consideration by alleging that the war revenue tax was a general tax existing contemporaneously with the New York state transfer tax act, and that the tax was imposed upon the right to succession of the whole of the legacy or distributive share, irrespective of whether the property was situated in one state or in several states, while the inheritance tax statutes of Utah, Minnesota, Wisconsin and New Jersey impose a tax upon the specific property. A careful perusal of the transfer tax statutes of the states mentioned fails to disclose that

they impose a tax upon the specific property liable to taxation. On the contrary it appears that the language of the inheritance tax statutes of those states follows very closely that of the transfer tax statute of the state of New York and even adopts the phraseology of our statute in the clauses which enumerate and describe the transfers that are taxable. The constitutionality of the New York transfer tax act has been sustained upon the ground that it provides for the imposition of a tax upon the right to succeed to property and not upon the property itself. *Knowlton v. Moore*, 178 U. S. 41; *Orr v. Gilman*, 183 id. 278; *Blackstone v. Miller*, 188 id. 189.

The provisions of the statutes of the other states of the Union, directing that the property therein located shall not be transferred until the inheritance tax is paid, do not imply that the tax is imposed upon property; they are inserted for the purpose of enabling the state to compel payment of the tax. If a state where the property of a non-resident was located at the time of his death permitted such property to be transferred before the inheritance tax was paid, it might be unable to collect the tax. In order to avoid the possibility of being unable to compel payment of the tax in the event of the property being removed beyond the jurisdiction of the state before the tax was paid, the different states have embodied in their respective tax statutes a clause directing that the property of a nonresident shall not be transferred until the tax is paid. But this does not make the transfer tax a tax upon the property; it is merely a method of procedure adopted to insure payment of the tax.

Our statute provides that the tax shall be imposed upon the clear market value of the property transferred (Tax Law, § 220, subd. 7). The transfer is effected by the will of the decedent or by the intestate laws of the state, and takes effect upon the death of the decedent. *Matter of Scaman*, 147 N. Y.

692; Matter of Davis, 149 id. 539. The right of the legatee or beneficiary accrues at that time. Therefore, the clear market value of the property must be ascertained as of the date of decedent's death, without taking into consideration what may subsequently be paid in the form of a tax for the privilege of permitting the legatee to take the property bequeathed. The state now imposes a tax as a condition of permitting the legatee or beneficiary to take the property. It is immaterial from what source the legatee or executor procures the tax; but the states, for their own protection and to insure the collection of the tax, have provided that the executor or administrator shall be liable for its payment; and, in the case of a nonresident, that the property shall not be transferred until the tax is paid. But the tax is not necessarily payable out of the particular property bequeathed or inherited. It may be paid from any source. If, instead of paying the tax out of the property bequeathed, it is paid by the legatee out of his individual property, it becomes at once apparent that the value of the property transferred is its clear market value at the date of decedent's death without any diminution on account of the tax imposed by the state as a condition of the transfer. Ordinarily the tax is deducted by the executor from the amount of the bequest and the balance paid to the legatee, but this is done for convenience and not because the legacy is the primary fund for the payment of the tax. The statute does not say that the tax shall be imposed upon the net amount which the legatee receives, but it does provide that the tax shall be imposed upon the clear market value of the property transferred by the will of the decedent. The amount of the tax is not an expense of administration, because the tax is imposed upon the interest of the legatee or beneficiary and not upon the estate.

It would, therefore, appear that an inheritance tax imposed by other states of the Union upon the property of a resident of

this state should not be deducted from the market value of **such** property in order to ascertain its value for the purpose of the transfer tax in this state.

There are two theories of taxation which have come down the ages of organized government; the primary theory is that taxation is an orderly and equalized contribution to the legitimate expenses of government; the other that taxation is an arbitrary levy by the supreme power of the state for any purpose which for the time being seems expedient. The primary conception or theory is consistent with constitutional and free government; the other theory is consistent only with arbitrary government or tyranny. History shows that tyranny may exist under popular forms. This fact was conceded by the framers and founders of the great Constitution, which they had sealed with their blood.

The familiar statement of chief justice Marshall, "That the power to tax involves the power to destroy" (*McCullough v. State of Maryland*, 4 Wheat. 316, 431) was an unfortunate sequel to so admirable a form of government. If examined critically the statement of the great chief justice will be found to authorize a perversion of political power. If government is a delegation from the governed, and free government is always that, government has no inherent power to destroy the property of its citizens, except in time of war and to stay devastation in time of peace. The power to destroy is not the equivalent of the taxing power.

That every government is invested with power to lay taxes is a truism of political philosophy. It is an inherent necessity. But free governments may tax only pursuant to principles of economic justice and of political freedom. That the statement of Chief Justice Marshall is to some extent responsible for extravagant notions and exactions, only too prevalent in the modern state, can hardly be denied. Its in-

accuracy detracts from his distinguished service to this country.

If the constitutional boundaries of the taxing power are unlimited, as the statement of Chief Justice Marshall implies, they nevertheless have a natural boundary in economic necessity, which must finally curb superfluous and mischievous governmental activities, or extravagance, on the part of the state. The natural limitations on the taxing power will be found to depend on the same causes which produce or underlie economic prosperity. When taxation persistently violates these causes, government must give way, or in the end be succeeded by some other form of government. While the submission to any governmental measure is in this country to be depended on in times of prosperity such submission will not survive the prosperity of a country which persistently violates economic freedom, or inexorable economic laws. The law of gravitation is no more fixed than the laws which promote or retard prosperity. There is another consideration now always to be regarded by the taxing power. Property only is the subject matter of taxation. Privilege has no existence independent of property and the idea that it has is a fallacy. Property is a form of credit. Subtract credit from property and it becomes worthless. In these modern days property or credit has become as mobile as labor, which is only another form of property. If credit is unduly alarmed, the owner will remove himself to a state where credit is secure. There is no political impediment to denationalization or repatriation in this century. Creditors will ultimately therefore congregate in the sound economic state and abandon the unsound. Not only is this last statement a fact, but it is also a fact that no other principle is better established than that excessive or false taxation is both inexpedient and in the end nonproductive.

It is not correct to assume that the right of private property

is in America a concession from the state, and therefore that property is subject to be returned to the state on demand. When this government was formed private property already existed. The state with us did not originate property or the rights of property, and the political concept that private property flows from the state has no place in our constitutional history. Such a concept is with us an anachronism.

Thus far the history of this government has demonstrated that a truly popular form of government is the most just and conservative. Our government has been the envy and the despair of other nations. It seems a sad pity when we abandon conservatism and resort to the false theories and desperate expedients of dying forms of government on the edge of economic destruction. We should persist in the safer paths which have led us to success.

The interest of most thinking men in forms of taxation is that such forms shall be consistent with the endurance of free government and not with the principles destructive of it. Most wise men are convinced that free government and unjust or arbitrary taxation can not coexist. Property is both an instinct and the extension of liberty, and when the rights of property are persistently invaded by government, self-preservation will surely lead men to subvert that government in the end. These are, I venture to think, sound and wholesome reflections on a subject now too little considered.

The theory of the political opportunist, that taxation may serve to adjust social and economic inequalities is fundamentally unsound. Those who are really in sympathy with their poorer brethren; who prefer the simple existence of the poor to that of the rich, or elementary simplicity to the miserable redundancies of the richer existence, may be trusted to support every wise measure which has the betterment of the poor for its real end, provided that measure coincides with the grammar of

political and economic science. Such men believe that the demonstrations of mathematics and experience are to be preferred to political empiricism, however alluring. The difference between such men and those more progressive is only one of method. All true economic betterment should be based on actuarial data which are incontestable. It can not be based on confiscatory taxation or destruction of property if it is intended to endure.

But however indefensible, in the abstract, the order fixing the tax in this matter may seem, it is in accordance with positive law and high authority construing that law, and it must be affirmed.

Decreed accordingly.

WILLIAM W. PENFIELD, as Executor, etc., of LOUISA ANN PENFIELD, Deceased, Respondent, v. SUSAN A. PENFIELD, Appellant.

(First Department, February 7, 1913.)

DECEDENT'S ESTATE—BOARD AND LODGING FURNISHED BY TESTATRIX—
EVIDENCE—FINDINGS AGAINST WEIGHT OF EVIDENCE.

Actions by an executor to recover for the board and lodging furnished to the defendant by the testatrix, her stepmother and aunt. Evidence examined, and *held*, that findings in favor of the plaintiff are against the weight of evidence.

DOWLING, J., dissented, with memorandum.

APPEAL by the defendant, Susan A. Penfield, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of November, 1911, upon the decision of a referee to whom the issues had been referred to hear, try and determine.

Thomas a McKennell [George C. Appell and Alfred H. Appell, with him on the brief], for the appellant.

Gerard Roberts, for the respondent.

LAUGHLIN, J.—During the period from September 1, 1901, to November 1, 1905, the appellant resided with her stepmother at the homestead in Westchester county, which the appellant's father had by will left to his widow, the plaintiff's testatrix, for life "as a house for my family," and this action is brought to recover for the board and lodging of the appellant during that time. The plaintiff alleges that the board and lodging were furnished at the request of the appellant and were reasonably worth the sum of twenty-five dollars per week. These allegations were put in issue by the answer and the appellant alleged that the board and lodging were furnished to her gratuitously, and she also interposed the Statute of Limitations as a bar to a recovery. The action was not commenced until the 5th day of August, 1910. The referee rules that the action, in so far as a recovery is sought for the period prior to August 5, 1904, is barred by the Statute of Limitations; but he allowed a recovery for the period between the 5th day of August, 1904, and the date of the death of appellant's stepmother, November 1, 1905, at a rate of twenty-five dollars per week, that being the value of the board and lodging as given by two boarding house proprietors called by plaintiff as experts in answer to hypothetical questions. The appellant and a brother are the surviving issue of their father's first marriage. The second wife of the appellant's father was his first wife's sister, and, therefore, the plaintiff's testatrix, in behalf of whose estate a recovery for appellant's board and lodging is sought was both appellant's stepmother and aunt. Moreover, appellant's mother died within a week after appellant was born, and her aunt, who,

within about five years became her stepmother, cared for and brought her up as if she were her own child. The appellant continued to reside with her father and stepmother until about 1892, at which time she was about forty years of age. Prior to appellant's birth her mother's mind had been affected, and evidently the appellant inherited a weak mind, for she was and is of a melancholy disposition and eccentric, and her presence annoyed and at times tested the patience of those about the household, although, apparently out of consideration for her mental condition, no feeling of ill will was entertained against her. During the year last mentioned the appellant's father took her away from home on a visit, and, instead of bringing her back, left her as a boarder where they had visited, and from that time on until he died, in August, 1896, she did not again become a permanent member of his household, although from time to time she made short visits home, and she was visiting there when her father died. Appellant's stepmother left two sons, the issue of her marriage to appellant's father. On the death of appellant's father she and her brother and her stepbrother William and her stepmother constituted the remaining members of the household. William was unable to or would not bear with appellant's eccentricities, and he insisted that she should not remain a member of the household, and he evidently induced his mother to visit her son, who was not living at home. The appellant, finding that she was left alone, went away and boarded again, and, except for occasional visits home, she boarded at numerous places, including the home of her stepbrother James, until about the 1st of September, 1901. About this time William ceased to be a member of the household, and thereupon his mother, with his consent, requested James to invite the appellant to return to the homestead and live with her, which the appellant did, and remained there until the death of

her stepmother. In such circumstances the law will not *imply* a promise to pay for board or lodging. (Collyer v. Collyer, 113 N. Y. 442; Sullivan v. Sullivan, 6 Hun, 658; Williams v. Hutchinson, 3 N. Y. 312, 319.)

There is no evidence that any express contract was made between the appellant and her stepmother, either with respect to *the amount* to be paid or charged for board and lodging, or either, or that appellant *was to pay* for either board or lodging. There is no evidence that appellant's stepmother ever presented a bill for board or lodging, or ever demanded from her or asked for the payment of any amount for either board or lodging. The judgment against the appellant is predicated upon an implied agreement to pay the *reasonable value* of the accommodations furnished to the appellant by her stepmother. There is evidence in the record tending to show that the appellant *understood* that she was to pay for her board and lodging, and that she intended so to do, and that her stepmother intended to make a charge therefor, and that the appellant was desirous at different times of having the amount she was to pay agreed upon; but there is no evidence that there ever was any agreement with respect thereto between her and her stepmother. Considerable of the evidence tending to show that the plaintiff's testatrix intended to charge the appellant for board and lodging consists of declarations made by the testatrix in the absence of the appellant which appear to have been drawn out on cross-examination of a witness for plaintiff, or received without objection. With the exception of these declarations made by the stepmother in her own interest, there is no evidence in the record from which it could be fairly inferred that there was an agreement between testatrix and appellant that the latter should pay for her board and lodging, excepting the evidence given by a nurse in the employ of the testatrix who testified, in effect, that some six months prior to the testatrix's death she witnessed a conversa-

tion between the testatrix and the appellant which arose from the fact that the appellant had ordered delicacies from the grocer's, and the witness says that the testatrix complained and said that the appellant would have to pay "board," or "more board," or "higher board" if she wanted "such things" ordered. The witness says, however, that the appellant asserted her right to live at home without paying board, and stated that if she were to be charged board she would leave. One version of that interview as given by the witness is entirely consistent with the absence of any agreement to pay board, and, therefore, a recovery on her testimony should not be permitted.

There is in the record competent evidence of declarations against interest made by the testatrix to her son and his wife to the effect that she was not charging, and did not intend to charge, appellant for either board or lodging, notwithstanding the fact that her son William was insisting that she do so. There is evidence in the record upon which it is argued that it is not improbable that appellant was to be charged with board and lodging, and that the testatrix intended, as William testified she stated to him, to charge the appellant for board but not for lodging. The appellant during these years had an income from property left in trust by her father of between \$1,500 and \$2,000 a year. The income of her stepmother could not have been much more than that amount, for she had the income from a trust fund of \$20,000, and the rent of a house in Lexington avenue, borough of Manhattan, New York, which rented for \$1,200 a year. Prior to the time when the testatrix invited the appellant to return home the appellant had been declared a paranoiac by a physician who had examined her, and it was thought that it would be necessary to send her to a sanitarium, but her income would have been insufficient to maintain her there. She had prior to her return home been paying \$15 per week for board and lodging. There

is evidence tending to show that the will of appellant's father, as construed by at least one member of the family, precluded a charge being made against appellant for lodging, and that the testatrix understood that her deceased husband intended that the appellant should be permitted to live at home. Her father by his will gave her the furniture in her room in the family mansion which, together with the clause in his will by which he left the use of the homestead to his widow "as a house" for his "family," is some indication that the appellant had a right to the use of the room known and recognized by her father as her room. The fact that appellant's brother and stepbrothers prior to the time she returned home had executed an agreement construing the will as entitling the stepmother to the use of the entire house, and that while appellant was afforded a home there she was induced to sign the same agreement, does not materially weaken the contentions made in her behalf on this appeal. If there was any evidence of an express contract between the testatrix and the appellant for the payment of her board it would not be improbable, in the circumstances, that such an agreement was made; but in the absence of such evidence, and in the absence of any claim made by the testatrix during this period of over four years, for part of which period one of the sons of the testatrix was managing the property of the appellant under a power of attorney, and with income owing to appellant which might have been appropriated to the payment of her board—it is improbable that there was any agreement for the payment even of board or that the testatrix intended to make any charge against the appellant therefor. The reasonable inference from the evidence is that the testatrix had great sympathy for the appellant and an affection for her akin to that of a mother, and that in so far as she administered to the wants, care and accommodation of the appellant she did so gratuitously and without any expectation of reward.

We are of opinion, therefore, that the findings in favor of the plaintiff are against the weight of the evidence.

It follows that the judgment should be reversed, with costs to appellant to abide the event, and a new trial ordered before another referee.

INGRAHAM, P. J., McLAUGHLIN and CLARKE, JJ., concurred;
DOWLING, J., dissented.

DOWLING, J. (dissenting):

I dissent and favor the reversal of the judgment and the granting of a new trial only if plaintiffs should refuse to agree to a reduction of the amount awarded to the sum of \$967.50 with interest, amounting in all to \$1,300.16, being at the rate of \$15 per week for the board and lodging furnished defendant, that in my opinion being a fair and reasonable compensation therefor.

Judgment reversed and new trial ordered before another referee, with costs to appellant to abide event. Order to be settled on notice.

In the Matter of the Application to Revoke the Letters Testamentary of GESINE ENGEL, as Executrix of CLAUS DOSCHER, Deceased, and for Her Removal as Trustee under the Will of CLAUS DOSCHER, Deceased.

HENRY DOSCHER and Others, Appellants; GESINE ENGEL, as Executrix of and Trustee under the Will of CLAUS DOSCHER, Deceased, Respondent.

(Second Department, February 28, 1913.)

EXECUTORS AND ADMINISTRATORS—SECTIONS 2685, 2686 AND 2687 OF THE CODE OF CIVIL PROCEDURE CONSTRUED—WHEN REMOVAL OF EXECUTOR OR TRUSTEE NOT DISCRETIONARY WITH SURROGATE—DUTY OF SURROGATE TO MAKE FINDINGS.

Where upon the return of a citation issued under section 2686 of the Code of Civil Procedure for the removal of an executor or trustee, if any of the objections specified in section 2685 of the Code of Civil Procedure, except those mentioned in subdivisions 3, 4 and 5, are established, the surrogate must make a decree revoking the letters issued to the person complained of.

The discretionary power given the surrogate by section 2687 of the Code of Civil Procedure to refuse to revoke letters in cases arising under subdivisions 3, 4 and 5 of section 2685 of the Code of Civil Procedure necessarily excludes such a discretion under the other subdivisions of said section.

Hence, where on the return of a citation the proof shows that the executor or trustee complained of is unfit to execute the office for the reasons stated in subdivision 2 of section 2685 of the Code of Civil Procedure, a decree refusing to revoke the letters of such executor or trustee should be reversed.

It is the duty of the surrogate in a matter of this kind to make findings of fact supported by the evidence in harmony with the petition and to make conclusions of law upon the facts so found.

RICH and HIRSCHBERG, JJ., dissented, with opinion.

APPEAL by the petitioners, Henry Doscher and others, from

a decree of the Surrogate's Court of the county of Kings, entered in said Surrogate's Court on the 21st day of December, 1911, denying an application to revoke letters testamentary issued to Gesine Engel and for her removal as trustee.

Henry F. Cochrane, for the appellants.

Edward H. Wilson, for the respondent.

WOODWARD, J.—Claus Doscher by his last will and testament nominated and appointed his sons, Henry Doscher, John Doscher and Charles Doscher, and his daughter, Gesine Engel, his executors and trustees, and the matter now before us arises upon an application made by the three brothers above named, as executors, trustees, devisees and legatees under said will, for the removal of Gesine Engel as executrix and trustee. The allegations of the petitions set forth matters which, if true, bring the case within the provisions of subdivision 2 of section 2817 of the Code of Civil Procedure, but it is to be noted that there is a distinction in the proceedings between those under section 2685 and those under section 2817 of the Code of Civil Procedure which is not generally observed in the discussions of questions of the character of that now before us. In the case of a petition under section 2685 of the Code of Civil Procedure it is provided (§ 2686) that it must set forth the facts and circumstances showing that the case is one of those specified in the preceding section, and upon proof, by affidavit or oral testimony satisfactory to the surrogate, of the truth of the allegations contained in the petition, a citation must be issued according to the prayer thereof. Section 2687 of the Code of Civil Procedure then provides that upon a return of the citation, "if the objections, or any of them, are established to the surrogate's

satisfaction, he must make a decree, revoking the letters issued to the person complained of." After making this positive provision, the section of the Code last above cited provides that "the surrogate may, in his discretion, dismiss the proceedings, upon such terms, as to costs, as justice requires, and may allow the letters to remain unrevoked, in either of the following cases," which are cases arising under subdivisions 3, 4 and 5 of section 2685 of the Code, and this exception from the general application of the statute would seem to indicate an intention on the part of the Legislature to make it mandatory upon the surrogate to make a decree revoking the letters, under the other subdivisions of the section. The maxim *expressio unius est exclusio alterius* seems to us to be applicable here, that the Legislature having especially provided for the cases in which the surrogate may exercise discretion it necessarily excluded the exercise of discretion in reference to any of the matters arising under any other subdivision of the statute. While this maxim will not be permitted to defeat the obvious legislative intent where it conflicts with the letter of a statute, such intent must, nevertheless, be discernible in the context of the statute itself (Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 57), and here the letter of the statute is that "if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree, revoking the letters issued," so that there is no conflict with the letter of the statute. It is plain and unambiguous; it imposes the duty of revoking the letters when the surrogate is convinced of the truth of the allegations of the petition, except in the cases arising under the 3d, 4th and 5th subdivisions of section 2685 of the Code of Civil Procedure. As to these the surrogate is given discretionary power, and this necessarily excludes such a discretion under the other subdivisions of the section of the Code now under consideration.

This view of the case was urged before the Surrogate's Court,

but the learned surrogate, in an opinion handed down (74 Misc. Rep. 308), after stating the proposition, says: "This construction, however attractive, is forbidden by authority," citing several cases. He then adds: "These cases make it clear that although a violation of duty or even breach of trust may be found upon the evidence, the letters should not be revoked if the fund or estate is in no danger of being lost," and then he proceeds to dispose of the question upon the theory that as there is an accounting pending on the part of the other executors, the respondent may be brought in and charged with any losses which may have resulted because of her misconduct, and the decree dismisses the proceeding upon the merits. Of course, if the construction which we have pointed out above is "forbidden by authority," and the surrogate has the discretionary power to refuse to revoke letters where he is convinced of the truth of matters set forth in the petition and which are within the requirements of subdivision 2 of section 2685 of the Code of Civil Procedure, then the decree before us should be affirmed, even though the record clearly establishes the fact that the respondent has been guilty of conduct which renders her unfit for the discharge of the duties of the office of an executor, because she appears to have practically abandoned its duties and to have turned them over to her husband, who has intruded himself from the very first in the affairs which the testator had expressly confided to his executors. (See Matter of Waterman, 112 App. Div. 313, 315, 316.) Let us then examine these authorities and see how far they forbid that construction which appears to be sanctioned by a well-established rule.

The first case relied upon is that of Matter of Monroe (142 N. Y. 484). This case had absolutely nothing to do with the question of the proper construction to be put upon section 2685 of the Code of Civil Procedure. The surrogate had revoked letters of administration, the only material ground appearing

in the record being that the administrator had foreclosed a mortgage which he held against the estate of the decedent, under circumstances which might have called for action on the part of a court of equity, but it was pointed out that the administrator had no control over the real estate; that he had a perfect right to foreclose his mortgage, and that the Surrogate's Court was without equitable jurisdiction and could not, therefore, be justified in removing an administrator for something which did not come within the condemnation of any known law. This is clearly not a forbidding authority against the contention of the petitioners.

Matter of O'Hara (62 Hun, 531) is the next case cited. This case did not arise under the provisions of section 2685 of the Code of Civil Procedure; it was an application for the removal of a testamentary trustee under the provisions of section 2817 of the Code of Civil Procedure. In that section it is merely provided that a person beneficially interested in the execution of a trust may present to the Surrogate's Court a written petition, duly verified, setting forth the facts and praying for a decree removing a testamentary trustee from his trust, and that he may be cited to show cause why such a decree should not be made in a case "Where, by reason of his having wasted or improperly applied the money," etc., following the language of subdivision 2 of section 2685 of the Code of Civil Procedure, but there are no provisions relating to this section which prescribe what the Surrogate's Court is to do in reference to the issuing of the citation, or what the surrogate shall do upon the return of such citation. In such a case the usual practice would prevail, no doubt, and the Surrogate's Court would be justified in exercising a sound judicial discretion in determining whether there should be a removal of a testamentary trustee. It was in reference to such a situation that the court quoted the rule from Perry on Trusts (4th ed. §

276): "Nor will a trustee be removed for every violation of duty, or even breach of the trust, if the fund is in no danger of being lost. The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy." But there is a distinction between the average trust of a specific fund to invest and pay over the income, such investments being made in funds approved by the deed or will, or by statute, and the duties of an executor, who is called upon to close up the multifarious affairs of an estate, and the court in *Matter of O'Hara (supra)* merely held that the surrogate had properly exercised his discretion in refusing to remove a trustee who was shown to be entirely solvent, and the investment, which had been made in Connecticut with the knowledge and approval of the principal beneficiary and from which he had derived a substantial income for many years, was not likely to result in any loss to the trust fund. The case is not an authority against the construction of section 2687 of the Code of Civil Procedure contended for by the petitioners.

Elias v. Schweyer (13 App. Div. 336), also cited, is another application for the removal of a testamentary trustee, though not under the Code, and the principal question determined upon an appeal from a judgment, was that the court erred in disposing of the case without the presence of infant remaindermen under the provisions of a will. So far as it dealt with the question of the removal of the testamentary trustee, it followed the *O'Hara Case (supra)*, and lays down no different rule.

The next case cited is that of *Matter of Waterman* (112 App. Div. 313), and this clearly does not forbid the construction contended for by the petitioners; it held that the mere fact that

two executors refused to act with a coexecutrix in the presence of her son, whose conduct was offensive, furnishes no ground for their removal, and the reasoning of that case overruling a decree removing executors clearly justifies the removal in the case now before us.

Matter of Thieriot (117 App. Div. 686) was determined upon the right of the surviving partner to close up the affairs of the partnership, and the remarks of the court, based upon *Elias v. Schweyer* (*supra*), and the case last above distinguished, were not necessary to the decision, and have no bearing upon the point for which it is cited by the learned surrogate.

Matter of Burr (118 App. Div. 482) was a case in which the court was called upon to act under the provisions of section 2685 (Subd. 2) and the removal was made, but it appeared upon review that the principal matter on which the surrogate acted was entirely outside of the issues tendered in the petition, and that the application for removal was not made until after the executor had procured a judicial settlement of his accounts, which showed conclusively that the estate had suffered no detriment from the fact—which was alone within the issues tendered—that the executor had invested moneys of the estate in a manner unauthorized by law. It was there held that the power to remove was given for the protection of the estate and not for the punishment of the executor, but it does not forbid the operation of the ordinary rules of statutory construction.

These are the only cases relied upon by the learned surrogate as forbidding the construction which seems to us demanded by section 2687 of the Code of Civil Procedure, and as the matter seems to have been disposed of upon the theory that the surrogate had a discretionary power to refuse to remove the respondent, even though he was convinced that the facts alleged in the petition, and which are made a justification for removal

by section 2685 of the Code of Civil Procedure, actually existed, we are of the opinion that the decree should be reversed.

The decree of the Surrogate's Court should be reversed and a new hearing granted, the facts found not being sufficient to determine the question presented. Indeed, the so-called findings of fact made by the learned surrogate have practically no bearing upon the issues tendered by the petition, while each and every request to find made by the petitioners, although some of them are absolutely uncontradicted, are refused. It is the duty of the Surrogate's Court, in a matter of this kind, to make findings of fact supported by the evidence in harmony with the petition, and to make its conclusions of law upon the facts so found. (*Matter of Dittrich*, 120. App. Div. 504.) This has not been done in the present case, though the record extends to two large volumes of evidence and exhibits and seems sufficient to justify the most of the findings requested by the petitioners.

The decree appealed from should be reversed, with costs, and a new hearing should be had in harmony with this opinion.

JENKS, P. J., and BURR, J., concurred; RICH, J., read for affirmance, with whom HIRSCHBERG, J., concurred.

RICH, J. (dissenting):

I dissent. Before the removal can be justified, it must be shown by competent conclusive evidence that the interests of the estate, as distinguished from the caprice and wishes of coexecutors, are jeopardized. (*Matter of Burr*, 118 App. Div. 482; *Matter of Waterman*, 112 id. 313; *Matter of Thieriot*, 117 id. 686.) After a careful examination of the evidence I am unable to find a condition which would justify the removal, and no fact is found by the learned surrogate under which it could be justified, though it does unfortunately appear that she

has upon occasions been coerced in her official actions by her husband. It was said in *Matter of Johnson* (15 N. Y. St. Repr. 752), in a similar proceeding: "The principle governing the disposition of application such as this is well expressed in this phrase 'whom the testator will trust, so will the law.' The executor is the confidential agent, solemnly chosen by the testator to execute his wishes as they may be expressed in his will. To this agent the testator confides a most sacred trust. * *

* His will must be obeyed by courts and parties within the wholesome rules which have been made in the ages that have passed, by judges and courts of the highest order of ability, aided by vast experience in the practical affairs of men."

The respondent was undoubtedly selected because of the trust and confidence reposed in her, and if she has been remiss in the discharge of her duties to the extent of incurring a personal responsibility to the estate, that subject may be presented to the surrogate, to be passed upon by him in the proceeding for accounting which is now pending. (*Matter of Monroe*, 142 N. Y. 484.)

I must vote for affirmance.

HIRSCHBERG, J., concurred.

Decree of the Surrogate's Court of Kings county reversed, and matter remitted to said court to proceed in accordance with opinion by WOODWARD, J., with costs to abide the final award of costs.

**In the Matter of the Judicial Settlement of the Account of
MARY BENJAMIN, as Administratrix, etc., of ANN SHANNON,
Deceased.**

**MARY BENJAMIN, Individually and as Administratrix, etc., of
ANN SHANNON, Deceased, and Others, Appellants; THE
ATTORNEY-GENERAL OF THE STATE OF NEW YORK, Res-
pondent.**

(First Department, February 7, 1913.)

**EVIDENCE—PRESUMPTION—DEATH AFTER DISAPPEARANCE FOR SEVEN YEARS
—DECEDENT'S ESTATE—ACCOUNTING OF ADMINISTRATOR—DUTY OF SUB-
ROGATE TO MAKE DETERMINATION AS TO DEATH OF NEXT OF KIN.**

Where an unmarried woman disappeared without a known cause, leaving her personal effects behind her, and nothing concerning her can be discovered after diligent search, she is presumed to be dead after the expiration of seven years from the date of her disappearance.

The surrogate on the judicial settlement of the accounts of the administrator of an estate in which the person who re disappeared would have shared, should determine the fact of her death and order a distribution to the other next of kin. It is not necessary that such determination be made in a separate proceeding brought for that purpose.

**APPEAL by Mary Benjamin, individually and as administra-
trix, etc., and others, from a decree of the Surrogate's Court
of the county of New York, entered in said Surrogate's Court
on the 24th day of October, 1912.**

F. R. Minrath, for the appellants.

Robert P. Beyer, for the respondent.

DOWLING, J.—This is an appeal from a decree of the Sur-

rogate's Court adjudging that it has not been established by adequate proof or with sufficient particularity that Bridget Shannon is dead, or that she did not survive her sister, Ann Shannon, the intestate, and that the remaining one-fourth of the estate of Ann Shannon, reserved by the administratrix pursuant to a prior decree, which would have gone to Bridget Shannon, shall be paid by the administratrix into the treasury of the State for the benefit of the persons who may hereafter appear to be entitled thereto.

The question involved in this appeal is whether upon the papers presented by the petitioners it satisfactorily appears that Bridget Shannon had died before the death of the intestate, which occurred on November 12, 1910. This court has so recently laid down rules as to the presumption of death arising from long-continued and unexplained absence that no further discussion of that question is now required. (See *Matter of Wagener*, 143 App. Div. 268; *Cerf v. Diener*, 148 id. 150.)

In this case it appears that Bridget Shannon arrived in America in 1863, being then about twenty-four years of age. She obtained employment at Belleville, N. J., in the home of Dr. Ward, where Margaret Fitzpatrick, another sister, was also employed. She remained with this family for ten years, or until 1873, when, without a word to any one as to her purpose or intention, with no known or assignable cause, and with no suggestion of any reason therefor, she suddenly disappeared from the place of her employment, leaving behind her a trunk containing her clothes, and taking with her nothing save her then wearing apparel. She was then unmarried, and there is no suggestion that she married thereafter. From that time until the time of making the application herein, no letter or message of any kind had ever been received from her; she had not been seen by any of her family; they had never received any information as to any other person having seen or heard

from her, and she disappeared effectually and completely from human vision. Were she living she would now be about seventy-three years of age. At the time of her disappearance her sister Mary Benjamin, who came to this country with her, was employed and living in the city of Newark, N. J., and she has been in that vicinity ever since. Her sister Margaret Fitzpatrick, with whom she worked at Dr. Ward's, visited the Ward household after leaving their employment, and at the time of Bridget's disappearance was living in Orange, N. J., where she lived until 1901, and where her family have ever since resided. Mrs. Ward, who is still living, has never heard of Bridget since. Effort has been made by search through the various bureaus of vital statistics, and in insane asylums, as well as by calls upon persons likely to know of her continued existence, to ascertain whether any trace of Bridget Shannon could be found, but in every instance without success.

Applying the principles laid down in the cases just cited, it seems clear that under the facts in this case Bridget Shannon must be presumed to have been dead at the expiration of seven years from the date of her disappearance, and at the latest by December 31, 1882, which is seven years from the latest date, by the most liberal calculation, that can be deemed to have been the time of her disappearance. That the fact of the death of one of the next of kin should be determined by the Surrogate's Court, when called upon so to do, upon the judicial settlement of the account of an administrator, and not necessarily made in a separate proceeding for that purpose, is determined in Matter of Wagener (*supra*). In this proceeding the citation has been properly published as against Bridget Shannon, if living, or her unknown next of kin if any there be, and the provisions of section 2523 of the Code of Civil Procedure have been duly complied with. Her death without issue at the date mentioned being judicially determined, the share which

otherwise would have been hers must, therefore, be divided among the next of kin of Ann Shannon. The decree appealed from will, therefore, be reversed and the proceeding remitted to the Surrogate's Court for an entry of a proper decree, in accordance with this opinion, with costs to appellant payable out of the estate.

INGRAHAM, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Decreed reversed and proceeding remitted to Surrogate's Court as stated in opinion, with costs to appellant payable out of the estate. Order to be settled on notice.

CHARLES R. WELLS, Respondent, v. WILLIAM A. ROWLAND, Individually and as Sole Surviving Executor, etc., of SOPHRONIA ROWLAND, Deceased, and Others, Defendants, Impleaded with MABEL R. SHOEMAKER and Others, Appellants.

(Second Department, February 28, 1913.)

WILL—SUCCESSIVE LIFE ESTATES WITH REMAINDER TO CLASS—SUSPENSION OF POWER OF ALIENATION—PARTIAL INVALIDITY OF WILL—ACTION BY REMAINDERMAN FOR PARTITION.

A testatrix devised certain real property to her five children for life and provided that upon the death of any of such children those surviving should inherit the life interest of the deceased share and share alike, and that, upon the death of the last surviving child, the property ceasing to be a life interest should pass to her grandchildren share and share alike. The testatrix left her surviving the five children and certain grandchildren.

Held, that the will was not void in its entirety as unlawfully suspending the power of alienation;

That the devise in remainder after the termination of the two valid life estates was to a class, namely, the grandchildren of the testatrix;

That this remainder vested in them immediately subject to open and let in after-born grandchildren and to be terminated by the death of either during such time;

That upon the death of a son, the first child to die after the testatrix, his surviving brothers and sisters each took an estate for life in equal parts in the one-fifth share which he had previously enjoyed for his life;

That upon the death of a daughter, the second child to die, the one-fifth part of the estate which she had received for life under the will passed to her surviving brothers and sisters share and share alike, but upon her death as to the one-fifth share originally given to her deceased brother two successive life estates had run, one in the whole of said one-fifth during her deceased brother's life and the other in one-twentieth thereof during her life;

That the grandchildren then living became vested in possession of said one-twentieth part of the real property and the son of said deceased daughter had an undivided estate in fee and possession of a portion of that one-twentieth part measured by the number of grandchildren then living, which entitled him to maintain an action for partition, and a judgment overruling a demurrer to his complaint should be affirmed.

APPEAL by the defendants, Mabel R. Shoemaker and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 14th day of June, 1912, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling a demurrer to the amended complaint made upon the ground that the complaint did not state facts sufficient to constitute a cause of action in an action for the partition of real property.

Arleigh Pelham [Herbert B. Shoemaker with him on the brief], for the appellant Mabel R. Shoemaker.

K. C. Bates, for the appellants Pereira.

Sidney A. Clarkson, for the respondent.

BURR, J.—Sophronia Rowland died in September, 1888, owning real property, leaving a last will and testament containing, among others, the following provisions:

“*First*, after all my lawful debts are paid and discharged, I give and bequeath to my children, Adeline E. Wells, Sophronia Pereira, William A. Rowland, Jared S. Rowland and Ellen M. Wheeler, a life interest in my places No. 42 So. 9th St., and No. 304 So. 3rd St. in the City of Brooklyn, County of Kings and State of New York, (or the value received therefor, if I before or my children after my death (as provided for in this will) should deem it best to sell or exchange the above named property) each an equal share, that is to say a () one-fifth interest.

“2. Upon the death of any of my children as above named, then those surviving shall inherit the life interest of the deceased share and share alike.

“3. Upon the death of my last surviving child the property ceasing to be a life interest shall pass to my grandchildren, share and share alike.”

Sophronia Rowland left her surviving the five children above named as her only heirs at law. On March 18, 1891, Jared S. Rowland died unmarried and intestate, leaving him surviving as his only heirs at law his sisters Adeline E. Wells, Sophronia Pereira and Ellen M. Wheeler, and his brother William A. Rowland. Adeline E. Wells died on December 26, 1899. She left her surviving one son, Charles R. Wells, the plaintiff in this action. She left a last will and testament in which he was named as sole devisee. Sophronia Pereira, Ellen M. Wheeler and William A. Rowland, the remaining children of Sophronia Rowland, are still living and are parties defendant to this action. Sophronia Pereira has no children living at the present time. Her only son, Russell Pereira, died intestate February

12, 1904. He left him surviving a widow, defendant Lillian Pereira, and three children, defendants Lillian C. Pereira, Russell Pereira and Percival R. Pereira. William A. Rowland has two children living at the present time, defendants Harry H. Rowland and Mabel R. Shoemaker. Ellen M. Wheeler has two children living at the present time, defendants Frederick W. Wheeler and Adeline Wheeler Cimiarty. Plaintiff brought this action for a partition and division of the real property of which Sophronia Rowland died seized, alleging that the attempted devise thereof was void for the reason that the will created a life estate therein during the lives of her five children above named, and the last survivor of them, and that thereby the power of alienation was unlawfully suspended. As devisee of his mother, Adeline E. Wells, who was a child and heir at law of Sophronia Rowland, and a sister and heir at law of Jared S. Rowland, he claimed to be seized of an undivided fourth part thereof, and alleged that defendants Sophronia Pereira, Ellen M. Wheeler and William A. Rowland were each seized of an undivided fourth part thereof, and that the remaining defendants, grandchildren or great-grandchildren of said Sophronia Rowland, had no interest therein. Defendant Mabel R. Shoemaker, one of her granddaughters, and Lillian Pereira, the widow, and Lillian C. Pereira and Russell Pereira, two of the children of Russell Pereira, a grandson, demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. From the interlocutory judgment overruling such demurrer this appeal is taken.

The learned court at Special Term was of opinion that the power of alienation was unlawfully suspended. In that event the interest of plaintiff and of defendants, the surviving children of Sophronia Rowland, is correctly stated in the complaint. While we do not agree with the conclusion that the devise was void in its entirety, we are of opinion that plaintiff, as tenant in common, holds and is in possession of an estate in

inheritance in such land sufficient to enable him to maintain this action.

Upon the death of Sophronia Rowland each of her five children took an estate for his or her life in one undivided one-fifth part of her real property. Upon the death of the first of these the surviving four children took an additional estate for his or her life in equal shares in the one-fifth part of that property of which said deceased had up to that time been the life tenant. It may have been the desire of Sophronia Rowland that a similar result should follow upon the death of the second, third and fourth of her children, so that the last survivor should ultimately have an estate for his or her life in the whole of the lands of which she died seized. The law does not permit the giving of effect to such desire, but the devise does not, therefore, become wholly void. "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created." (Real. Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 43; Real Prop. Law [Gen. Laws, chap. 46; Laws of 1896, chap. 547], § 33; 1 R. S. 723, § 17.) The devise in remainder after the termination of the valid life estates was to a class, namely, the grandchildren of testator. There were members of that class in existence at the time of her death. This remainder immediately vested in them, but following the rule that where there is a devise to a class to take effect in possession upon the termination of a preceding particular estate, those persons who constitute the members of such class when such estate terminates shall be the ultimate beneficiaries, this remainder is subject to open and let in after-born

grandchildren, and to be terminated by the death of either during such time. (*Bisson v. West Shore R. R. Co.*, 143 N. Y. 125; *Matter of Baer*, 147 id. 348; *Connelly v. O'Brien*, 166 id. 406; *Moore v. Littel*, 41 id. 66; *Stevenson v. Lesley*, 70 id. 512.) Applying these rules to the case in hand, upon the death of Jared S. Rowland, the first child to die after testator, his surviving brothers and sisters each took an estate for life in equal parts in the one-fifth share which he had previously enjoyed for his life, so that at that time each had an estate for life in the one-fifth part originally given to him or her under the will, and an estate for life in one-twentieth in addition thereto. Upon the death of Adeline E. Wells the one-fifth part of the estate which she had received in the first instance under the will for her life passed on for a succeeding life estate to her surviving brothers and sisters, each taking an undivided one-fifteenth part thereof. But upon her death, she being the second child to die, as to the one-fifth share originally given to Jared S. Rowland, two successive life estates had been exhausted, one in the whole of said one-fifth during Jared S. Rowland's life, and the other in a quarter of said one-fifth, or one-twentieth thereof, during the life of Adeline E. Wells. The grandchildren then living and constituting members of the class entitled to the remainder, having been previously vested in estate, became then vested in possession of said one-twentieth part of the real property, under the doctrine of accelerating the remainder as to such portion at the end of the second life. Plaintiff then living thereupon took an undivided estate in fee and in possession in a portion of that one-twentieth part, the fractional part of his estate therein being measured by the number of grandchildren then living. On the death of Russell Pereira the undivided one-fifth in which he originally had an estate for life passed for a successive life estate in two equal parts to his surviving brother and sister. Inasmuch as he was the third of the children to die, at that time two successive life estates had been exhausted in

two undivided portions of the real property of which Sophronia Rowland died seized, *first*, in one-quarter of the one-fifth, or one-twentieth part, the whole of which had been in the first instance enjoyed by Jared S. Rowland during his life, and the one-twentieth part subsequently by Russell Pereira, and, *secondly*, in one-third of one-fifth part, the whole of which had in the first instance been enjoyed by Adeline E. Wells for her life, and the one-third of one-fifth, or one-fifteenth part having thereafter been enjoyed by the said Russell Pereira. As to these interests, the succeeding life estates failed, and the remainders vested in possession at once in equal shares in the grandchildren then living. Plaintiff, therefore, has a present estate in fee to which he is entitled in immediate possession in a portion of an undivided twentieth, and also of an undivided fifteenth of this land. The exact fractional parts thereof must be determined by the number of grandchildren living at the date of the death of Adeline E. Wells and Russell Pereira respectively. The defendants, or some of them, have either estates for life in other portions thereof, or vested remainders therein. Without further allegations it may be difficult to determine the exact extent of their present interests, and so far as the estates in remainder are concerned, this may be altered by the death of some of the grandchildren or by the birth of others. Plaintiff, however, has a sufficient estate in the land to enable him to maintain this action. Each fractional portion of the real property of which Sophronia Rowland died seized, whether the whole of a one-fifth share which she originally devised to each one of her children, or a sub-share carved out of this, must be treated as a distinct entity. (Chapl. Susp. Power Alien. [2d ed.] §§ 102-104; Vanderpoel v. Loew, 112 N. Y. 167; Graham v. Graham, 49 Misc. Rep. 4.) Under the rule of construction here invoked, as to neither of these distinct portions of such real property is the power of alienation unlawfully suspended, since upon the expiration of the second life in each

one of these, there were persons in being who could convey the entire fractional part.

The interlocutory judgment must be affirmed, without costs, with leave to the defendants within twenty days after the entry of the order herein to withdraw their demurrers and answer the complaint upon the payment of ten dollars costs.

JENKS, P. J., HIRSCHBERG, WOODWARD and RICH, JJ., concurred.

Interlocutory judgment affirmed, without costs, with leave to appellants to answer within twenty days on payment of ten dollars costs.

PHOEBE HATCH and EDWIN R. FORD, as Administrators, etc.,
of THOMAS SKYE, Deceased, Respondents, v. WILLIS LUCK-
MAN, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM
HATCH and PHOEBE HATCH, Respondents, v. CORNELIUS
CARPENTER and Others, Appellants.

(Fourth Department, March 5, 1913.)

INDIANS—TONAWANDA RESERVATION—STATE LAWS SUPERIOR TO INDIAN
CUSTOMS—POWER OF THE SURROGATE'S COURT TO GRANT LETTERS OF
ADMINISTRATION—CONVEYANCE OF INDIAN LANDS BY DEED—DISTRIBUTION
OF PROPERTY AT INDIAN TENTH DAY OR DEAD FEAST—PEACE-
MAKERS' COURT—JURISDICTION—PROHIBITION AGAINST DETERMINATION
OF LAND TITLE—TRIBAL CUSTOM AS TO INHERITANCE—CHILD BORN OF
MOTHER BELONGING TO ANOTHER TRIBE.

The political sovereignty of the State of New York attaches to all lands within the boundaries of the Tonawanda Indian Reservation.

The Indian custom known as the "Tenth Day or Indian Dead Feast" whereby the relatives and members of the tribal clan of a deceased Indian met and agreed upon a division of his lands and estate is not recognized or sanctioned by the laws of this State.

Hence, where a Tonawanda Indian dies leaving personal property within the Tonawanda Reservation the Surrogate's Court of the county of Erie has jurisdiction to issue letters of administration upon the personal estate, including a lease owned by him, although some of his relatives and fellow-tribesmen have made other disposition of his property at the tenth day feast.

The administrators of the estate of such Indian may bring an action for the conversion of crops growing upon the lands held under said lease.

Lands within the Tonawanda Reservation may be conveyed by deed, although there was a tribal custom allowing other methods of conveyance, as such custom has not been uniform.

In an action by administrators to recover the value of crops on lands leased to an Indian, since deceased, the measure of damages is not the rental value of the lands but the value of the crops removed.

The Peacemakers' Court of the Tonawanda Reservation has no jurisdiction to pass upon any question involving title to lands within said reservation, and said court and the plaintiffs therein will be restrained by writ of prohibition from prosecuting and deciding such question.

The ancient Indian custom by which the clan and tribal relations of an Indian were supposed to follow that of the mother rather than that of the father was based upon the difficulty of determining the paternity of a child when marital relations were loose and uncertain. It is not applicable to Indians who have adopted the ways and life of civilization.

Hence, although the wife of a Tonawanda Indian originally belonged to another tribe, a legitimate daughter who continues to be a member of the Tonawanda Reservation may inherit from her father lands within said reservation.

Laws and customs relating to the rights and property of Indians stated and discussed, *per* WHEELER, J.

APPEAL by the defendant, Willis Luckman, from a judgment of the Supreme Court, in favor of the plaintiffs, entered in the office of the clerk of the county of Erie on the 28th day of October, 1909, upon the decision of the court rendered after a trial at the Erie Trial Term, a jury having been waived.

Appeal by the defendants, Cornelius Carpenter and others, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of

Erie on the 28th day of September, 1909, awarding to the relators an absolute writ of prohibition.

George F. Thompson and William H. Coon, for the appellants.

Leroy Andrus, for the respondents.

Judgment and order affirmed, with costs, upon the opinion by WHEELER, J., delivered at Special Term.

All concurred.

The following is the opinion delivered at Special Term:

WHEELER, J.—We deem it proper to dispose of each of the above-entitled actions in one opinion, as the main questions up for decision are the same in each case, and grow out of the same general transactions.

Thomas Skye was a Tonawanda Indian, living at the time of his death on the Tonawanda Reservation in this State. He owned by allotment or Indian title four parcels of real estate on the Tonawanda Indian Reservation. Thomas Skye died on October 19, 1907, but on March 4, 1907, by formal deed of conveyance, he conveyed the lands in question to his son-in-law, William Hatch. On the same day Hatch gave back to Skye a lease of the lands in question for the term of five years.

Thomas Skye had been legally married to Martha George who was an Indian woman belonging to Cattaraugus tribe of the Seneca Nation of Indians. The only issue of that marriage was a daughter, the plaintiff, Phoebe Hatch.

Skye also left him surviving an illegitimate son named James Skye and three nephews, Stephen Skye, Cornelius Carpenter and Simon Parker, three of the defendants in the second entitled proceeding.

It further appears that on the tenth day after the death of Thomas Skye, to wit, on the 29th day of October, 1907, certain members of the clan to which Thomas Skye belonged met at

his last place of residence on the reservation and held what is known as the "Tenth Day Feast" or "Dead Feast," at which time the members of the clan present proceeded to appoint the said James Skye, son of Thomas Skye, Cornelius Carpenter and Simon Parker, nephews of said Thomas Skye, administrators of his estate, with power to pay his debts by renting his lands, and proceeded to distribute his lands to certain persons.

The parcel concerned in the action against Luckman went to Stephen Skye, Cornelius Carpenter and Simon Parker, nephews; another tract to the same persons; a third tract to James, his illegitimate son, and a fourth parcel to Eliza Hiram, with whom Skye had been living at the time of his death in meretricious relations.

It will be noticed that in this attempted distribution of Skye's real property the rights of his legitimate daughter and natural heir at law, Phœbe Hatch, were ignored. It is claimed by the defendants that this course was justified by reason of an Indian custom prevailing and having the force of law on the Tonawanda Indian Reservation, and that the laws of the State of New York do not control in the distribution and disposition of the estates of deceased Indians. We shall have occasion to refer later in our opinion to these Indian customs.

On the same day the Tenth Day or Dead Feast was held, two of the members of the clan, together with one Poodry, a witness of the proceedings at the feast, went to the house of the clerk of the tribe and then and there informed the clerk of the disposition made of the decedent's lands, and the clerk thereupon recorded them upon the book of record of the tribe in the names of the several distributees. The so-called administrators thereupon proceeded to lease one of the parcels to the defendant Luckman by a written lease approved by the council and attorney of the reservation, for the purpose, as claimed, of raising money to pay the debts and funeral expenses of the decedent.

William Hatch, the grantee of Thomas Skye, on November

16, 1907, took his deed of conveyance to the clerk of the reservation and secured its record.

Subsequent to the death of Thomas Skye, his daughter, Phœbe Hatch, instituted proceedings in the Surrogate's Court of Erie county seeking the appointment of administrators of the estate of the said Thomas Skye, deceased. The surrogate thereupon caused citations to issue and be served upon the said Carpenter, Parker and James Skye, advising them of the filing of the petition for letters, and directing them to show cause why such letters should not be issued. They appeared in obedience to such mandate and filed objection to the issuing of such letters, and contended before the surrogate that the Surrogate's Court had no jurisdiction to act in the premises.

After a careful consideration of the questions raised, the Surrogate's Court decided it had jurisdiction and authority to take jurisdiction over the estate of the said Thomas Skye, deceased, and issued letters of administration thereon to the plaintiffs Phœbe Hatch and Edwin R. Ford.

The defendant Willis Luckman, acting under the lease given him by the Indian administrators, entered upon the premises described in the lease, and planted crops thereon, which he subsequently harvested and took away. The plaintiffs in the first above entitled action thereupon brought said action, alleging an unlawful entry on the land and a conversion of the crops, and asked damages for his so doing.

Subsequent to the commencement of this action proceedings were instituted before the Peacemakers' Court of the Tonawanda tribe by the said Cornelius Carpenter, Simon Parker and James Skye, in which the complaint set forth, in substance, the facts as above stated, and demanded judgment awarding possession of the several parcels to the plaintiffs in accordance with the distribution made at the Tenth Day Feast. We shall refer more particularly to these proceedings hereafter.

Thereupon the relators William Hatch and Phœbe Hatch

instituted proceedings in this court praying for a writ of prohibition enjoining and restraining the defendants from further proceeding in that action in the Peacemakers' Court.

This is the second of the proceedings above entitled, and is to be disposed of at this time in connection with the action for conversion of crops against Luckman.

The contention of the defendants in both of these actions or proceedings, in brief, is:

First. That the customs prevailing on the Tonawanda Reservation are superior to the laws of the State; or, to state the proposition in other words, that the laws of the State do not extend or apply to the matters in controversy, but that the Indian customs prevail.

Second. That the Surrogate's Court of Erie county had no jurisdiction to grant letters of administration upon the estate of Thomas Skye, deceased, and its decree is, therefore, void.

Third. That by the Indian customs, the deed given by Thomas Skye to William Hatch is void, and, consequently, the lease given back to Thomas Skye is equally void.

Fourth. That the distribution of the lands of Thomas Skye at the Tenth Day or Dead Feast is valid and legal.

Fifth. That the plaintiff Phœbe Hatch, by the laws and customs of the Indians, cannot be deemed a member of the Tonawanda tribe, but is in law a Cattaraugus Seneca Indian, and, therefore, incapable of holding land on the Tonawanda Reservation.

Sixth. That the Peacemakers' Court of the reservation has jurisdiction and authority to decide the questions brought before it, and the writ of prohibition should not be issued.

The disposition of the questions involved is of great importance to the State as well as to the individual litigants. It involves the whole question of the relation of the State and of its laws to Indians residing on the reservation, and their duties and obligations to the State and its laws.

The Tonawandas are not a separate and distinct Indian nation. The Tonawandas constitute only a tribal division of what is known as the Seneca Nation of Indians. There are but about 500 Tonawandas all-told. They are largely civilized. Many of their number are men of education and character. They live on a separate reservation lying partly in the county of Erie and partly in the counties of Niagara and Genesee. The reservation upon which to-day they reside was acquired by purchase. It is well-known history that shortly after the Revolution a dispute arose between the State of New York and the State of Massachusetts over the ownership of the territory constituting western New York. New York claimed ownership by virtue of royal grants from the English crown to the Duke of York. Massachusetts claimed the same territory under grants to the Plymouth and Massachusetts Colonies. By the convention held at the city of Hartford in 1786, the differences of the two States were settled and adjusted by New York ceding to Massachusetts her pre-emption rights to extinguish the Indian title to the land, and by Massachusetts in turn recognizing New York's political sovereignty over the territory.

Prior to the year 1838, the Tonawandas, being a part of the Senecas (the latter being one of the Six Nations of New York Indians), occupied and possessed, by virtue of their long continued Indian title, the grant of land known as the Tonawanda Indian Reservation, a portion of which is still known as the Tonawanda Indian Reservation. In 1838 a treaty was concluded at Buffalo creek by and between the United States and the several tribes of New York Indians (including the Tonawandas), in and by which the New York Indians released to Ogden and Fellows, among other lands, those on the Tonawanda Reservation, consisting of about 12,800 acres. (Indian Affairs, Laws & Treaties [Kappler], vol. 2, 502.)*

* See 57th Cong. 1st Sess. Sen. Doc. No. 452, vol. 2, pp. 373, 379, 397-399. & [REP.]

By a subsequent treaty between the United States and the Senecas, in 1842, the Cattaraugus and Allegany Indian Reservations of the Senecas were excepted from the provisions of the treaty of 1838, but the release of the lands lying in the Buffalo Creek and Tonawanda Reservations was confirmed. (Indian Affairs, Laws & Treaties [Kappler], vol. 2, p. 537.) *

In 1857 another treaty was entered into by and between the United States and the Tonawanda Indians, in and by which the Tonawandas bought back from Ogden and Fellows a portion of the Tonawanda Reservation containing about 12,800 acres, the treaty providing, "the land so purchased shall be taken by deed of conveyance to the Secretary of the Interior of the United States, and his successors in office, in fee, to be held by him in trust for the said Tonawanda Band of Indians and their exclusive use, occupation, and enjoyment, until the Legislature of the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians; whereupon they shall be granted by the said Secretary to such persons or public officer."†

Subsequent to this treaty, deeds conveying the present reservation to the Secretary of the Interior of the United States were made. Later an act of the Legislature of New York was passed designating the Comptroller of the State as the public officer to receive a conveyance of the reservation from the Secretary of the Interior, "in trust for the said Tonawanda Band of Indians, who shall, by virtue thereof, have and hold the exclusive use, occupation and enjoyment of the said lands." (Laws of 1860, chap. 439.)

On February 14, 1862, Caleb Smith, as Secretary of the In-

* See 57th Cong. 1st Sess. Sen. Doc. No. 452, vol. 2, pp. 373, 379, 397-399.—[REP.]

† See 57th Cong. 1st Sess. Sen. Doc. No. 452, vol. 2, pp. 579, 580. See, also, N. Y. Assem. Doc. 1889, No. 51, pp. 167, 169.—[REP.]

terior, deeded said reservation to Lucius Robinson, as Comptroller of the State of New York, and his successors in office, "in fee for the Tonawanda Band of Indians, and their exclusive use, occupation and enjoyment," by deed recorded in Genesee county clerk's office in liber 146 of Deeds at page 82.

It thus appears that the old Indian title and right of possession of the Indians was extinguished, and the Tonawanda Indians hold title by virtue of the deeds of conveyance above set forth. The political sovereignty of the State of New York attached to every foot of the land embraced within the boundaries of the Tonawanda reservation.

The Indians of this State do not possess the rights of citizenship, and are regarded as wards of the State. (*Johnson v. Long Island R. R. Co.*, 162 N. Y. 468.)

By reason of being wards and lack of citizenship, certain disabilities necessarily follow. Nevertheless the sovereignty of the State attaches to and governs every foot of the soil comprised within the reservation. The law of this State is supreme, and the Tonawandas, we think, can claim no sovereignty of their own superior to that of the State. The State from time immemorial has assumed to control and direct their affairs, and legislate in reference to them, and its authority so to do has never been doubted or questioned. Where the Indians assert any peculiar rights or privileges, they must find authority for them in the legislation and laws of the State, and not by reason of their peculiar customs, or tribal existence from immemorial times. Such sovereignty as they formerly possessed, we think it may be safely asserted, has at this time been merged and lost in the greater sovereignty of the State under which they must look for protection of life and property.

In the early part of the last century an Indian woman was tried and convicted on charges of sorcery and witchcraft by an Indian court or council in what is now a part of the city of

Buffalo. She was condemned to be executed. Two young Indians were directed to carry out the sentence of death. She was bound to the stake for that purpose, but the courage of her executioners failing, an Indian by the name of Soo-non-gize, sometimes called "Tommy Jemmy" seized a tomahawk and sunk it into her skull. He was arrested, tried and convicted of murdering the woman, and his case carried for review to the court of this State for the Correction of Errors. It was contended before the courts that the killing of the woman was but the carrying out of the directions of the judgment of an Indian court valid in law, for which the executioner should not be legally prosecuted. The court of necessity repudiated the contention and held the law of the State supreme.

As an outcome of this case of "Tommy Jemmy," the Legislature, by chapter 204 of the Laws of 1822, passed an act declaring that the sole and exclusive jurisdiction of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offenses committed within any part of the State, except crimes against the United States and in violation of its laws, was exclusively vested in the courts of justice of this State. The same act pardoned the Indian "Tommy Jemmy."

We do not understand that the act in question created any new power, or undertook to withdraw from the Indians any power or authority previously enjoyed by them, but was rather declaratory of the power the State actually already possessed. We are fortified in this view by the preamble of the act in question, which proceeds to recite that:

"WHEREAS, the Seneca, and other tribes of Indians, residing within this State, have assumed the power and authority of trying and punishing * * * for supposed crimes by them done and committed in their respective reservations, and within this State. And whereas, the sole and exclusive cognizance of all crimes and offences committed within this State, belongs

of right to courts holden under the Constitution and laws thereof, as a necessary attribute of sovereignty, * * *: Therefore," etc.

The same reasons for asserting exclusive jurisdiction in criminal matters obtains in civil matters.

Since that time the Indians of this State have advanced in intelligence, education and civilization, and we can see no reason why the common law of the land should not apply to and govern them and their affairs, save as special exemptions and privileges have been conferred upon them, or flow from their relation of wardship to the State.

When, therefore, the Tonawandas, or any member of their tribe, assert special rights and privileges, or exemptions from the common law of the State, the claim should be subjected to the strictest scrutiny.

In this case peculiar rights are asserted by reason of the alleged existence of what is known as the Tenth Day or Dead Feast, and certain distribution and division of the property of the late Thomas Skye made at it. It appears there did exist among the Indians, coming down from immemorial times, a peculiar custom known as the Tenth Day or Indian Dead Feast. It was a custom wherein the relatives of the deceased and members of his tribal clan, or such as chose to attend, assembled at the last place of residence of the dead man on the tenth day after his death and united in a feast. It had somewhat of a religious character, for it was thought by many that the spirit of the dead man joined the company in the feast prior to his final departure to the happy hunting ground.

On this occasion it was customary for those present to agree upon a division and distribution of such property as the deceased left.

There was such meeting after the death of Thomas Skye, and an attempted distribution of his lands and property was made.

It is contended that this feast constituted an Indian probate court, and that this court and every one else are bound to respect the action thus taken.

We think it a sufficient answer to that contention that such a court has no sanction for its existence in the Constitution or in any legislation of this State. It has never been recognized in law as having any legal existence. It has no existence in law. The fact that Indians' estates may have been divided and distributed in this manner is no argument for the claims here made. So have the heirs and next of kin of white men made division of estates without the instrumentality of probate courts. But such cases do not establish a court or make actions of such assemblies legally binding. We, therefore, are constrained to hold that the Tenth Day Feast and the actions of those attempting to administer and divide the lands and property of the late Thomas Skye was wholly without warrant of law and void.

In this connection, we might say that the custom of the Tenth Day Feast, in so far as it was possible, was formally abolished by a resolution of the council of the tribe passed about the year 1888. Such is the testimony in this case, and it stands undisputed.

But we deem it unimportant in the disposition of this case, whether the custom was in fact abolished or not, for no court can be recognized as having any authority or standing to deal with Indian affairs except such as may have been created and exist by virtue of the Constitution of this State, or by legislative action. The only court on the Tonawanda Reservation created and existing by authority of law is the "Peacemakers' Court." The powers and authority of the Peacemakers' Court are defined by section 47 of the Indian Law.

This brings us to the consideration of the action of the Surrogate's Court of Erie county which granted letters of administration to the plaintiffs Phoebe Hatch and Edwin R. Ford on the estate of Thomas Skye, deceased.

The defendants contended the Surrogate's Court had no authority to act in the premises. That it had no jurisdiction to grant letters or make any decree, and that, therefore, its decree is absolutely void, and vested the administrators with no rights or authority over the property of the intestate. This the defendants contend is true, notwithstanding that the parties to this proceeding were cited and appeared in the Surrogate's Court, and that no appeal was taken from the decree of that court, and it stands unreversed. •

The defendants rely on the case of *Dole v. Irish* (2 Barb. 639) to support their contention. Whatever force and effect the case of *Dole v. Irish* had, we think, has been greatly impaired and weakened by the more recent case entitled *Matter of Printup* (121 App. Div. 322). In that case, Daniel Printup, an Indian, died intestate on the Tuscarora Reservation in the county of Niagara. A petition was presented to the Surrogate's Court of Niagara county for letters of administration on his estate. The petition, among other things, stated that the Tuscarora Indians had no Peacemakers' Court or Surrogate's Court, and these allegations were not denied. The surrogate, however, refused to assume jurisdiction and dismissed the petition. On appeal to the Appellate Division, the order dismissing the application was reversed, and the court held that as the Tuscarora Indians residing on that reservation had no Peacemakers' Court or other judicial tribunal, in which the estate of the deceased Indian could be administered, the surrogate had jurisdiction to grant letters of administration. The court also held that section 5 of the Indian Law of the State, applying to all Indians, and providing that any demand or right of action, jurisdiction of which is not conferred upon a Peacemakers' Court, may be prosecuted and enforced in any court of the State the same as if all the parties thereto were citizens, applied to the situation presented, and authorized the Surrogate's Court to take jurisdiction of the matter.

We think the Printup case is decisive of the right of the surrogate of Erie county to grant letters of administration on the estate of Thomas Skye. It is true the Tonawanda Indians have a Peacemakers' Court, created by the statutes of this State. The jurisdiction conferred by that statute upon the Peacemakers' Court is exceedingly limited, and gives that court no right to exercise any of the power and authority conferred upon Surrogates' Courts in reference to decedents' estate.

The Tenth Day Feast we hold has been abolished by the action of the Indian council of the tribe, if it ever had any existence, and had no right to exercise powers of divisions and distribution over such estates. The surrogate of Erie county in granting letters of administration on the estate of Thomas Skye held, as matter of fact, that there was no court in existence on the Tonawanda Reservation having authority to administer on the estates of deceased Indians.

The question was also before the same court in the case of *Peters v. Tallchief* (121 App. Div. 309). The proceedings were brought to recover the possession of certain lands on the Tuscarora Reservation, occupied by Jeremiah Peters, a Tuscarora Indian, for many years and up to the time of his death. Both the petitioner and the defendant were Tuscarora Indians, the defendant being the daughter and the petitioner the daughter-in-law of the deceased. The land had been held by the deceased under an Indian allotment. The petitioner claimed the land by virtue of a devise made by said Jeremiah Peters, and had occupied and claimed to own the premises, but had been ousted by the defendant, whereupon summary proceedings were brought before a justice of the peace, who awarded the possession to the petitioner. On appeal to the Niagara County Court, the order of the justice was reversed (52 Misc. Rep. 617), but on appeal to the Appellate Division of this court the judgment of the County Court was reversed. It was held that by virtue

of section 5 of the Indian Law the justice of the peace had jurisdiction to entertain the summary proceedings although the controversy was between two members of the Tuscarora band, and related to lands on the reservation.

The court held the Indian right of possession a substantial right entitling him to the exclusive possession, and sanctioned by the Indian Law (Laws of 1892, chap. 679, §§ 7, 90), which authorized a native Indian to take, hold and convey real property, the same as a citizen (§ 2), and that the right of an Indian under such an allotment of tribal lands had been recognized and protected by our State courts. (*Jimeson v. Pierce*, 78 App. Div. 9.)

It was held the right of the petitioner to the lands was not only valid, but that she had the right to resort to our courts to redress a wrongful intrusion thereon by the defendant under the authority given by section 5 of the Indian Law.

To hold that an Indian is to be denied full and free access to our courts for the protection of his rights and the redress of his wrongs would be a monstrous denial of justice, particularly where the State has provided no special tribunal of their own for the settlement of such matters. The serious consequence which might follow such an attitude of our courts is well illustrated in the very case now under consideration, where it seems to us a great wrong is attempted to be done the daughter of Thomas Skye by those having no natural or legitimate claims to his estate.

We are, therefore, constrained to hold that the decree of the Surrogate's Court granting letters of administration to the plaintiffs Hatch and Ford on the personal property left by Thomas Skye was properly granted and vested in them the right to administer the estate left by the decedent. If the lease given by William Hatch to Thomas Skye of the lands in question for five years is a valid lease, then that leasehold is to be

deemed personal property and passed to the plaintiffs in their representative capacity, and their right to bring this action against Luckman for a conversion of the crops growing on the land is complete. The validity of the lease to Skye depends upon the validity of the deed given by Skye to William Hatch. If Hatch's title fails for any invalidity of the conveyance to him by Skye, the lease given back to Skye by Hatch must also fail.

The deed to Hatch possesses all the formalities sufficient to convey a good and sufficient title. It is, however, contended by the defendants that the deed in question is invalid and insufficient to pass to Hatch the Indian title of Skye. That by the custom and usage prevailing on the Tonawanda Indian Reservation transfers of title to land on the reservation are not made by written conveyance, but where transfers have been made from one Indian to another Indian it has been the custom for the parties to appear before the clerk of the reservation and have the transfer noted and recorded in the record book kept for that purpose without the instrumentality of a written conveyance. Unquestionably this method of making conveyances has been used to a greater or less degree by the Tonawanda Indians. But it has not been a uniform custom. The evidence in this case discloses that other methods of transferring lands prevailed. Written deeds duly signed and acknowledged have been passed and recorded and recognized as proper means of conveying Indian lands. The evidence to establish a custom so as to make it binding is in my opinion insufficient in this case. The fact that in a majority of cases a transfer has been made by one method does not preclude the validity of making a transfer in another, particularly where the transaction is evidenced by writing. The evidence falls far short of establishing any such uniform custom as is contended for. In order to establish and give validity to a custom it

must be certain, reasonable, continuing from time immemorial, continuing without interruption, not opposed to law or calculated to violate law. (6 Wait Act. & Def. 622.)

A custom may not be proved to contravene a rule of law. (*Hopper v. Sage*, 112 N. Y. 530; *Wright v. Boller*, 42 Hun, 77.)

The evidence fails to establish a custom as thus defined. The provisions of the Indian Law meet fully the situation presented in this case and sustain the validity of the deed given by Skye to William Hatch. Allotments of lands on the Indian Reservation are sanctioned by the Indian Law. (Laws of 1892, chap. 679, §§ 7, 9,* 90.) The same law expressly authorizes a native Indian to "take, hold and convey real property the same as a citizen." (§ 2.)* This right of an Indian under such an allotment of tribal lands has been recognized and protected by the courts. (*Jimeson v. Pierce*, 78 App. Div. 9; *Peters v. Tallchief*, 121 id. 311; *Jemison v. Bell Tel. Co.*, 186 N. Y. 493, affg. 109 App. Div. 911.)

The statute in question relates not only to the capacity to hold and convey, but as well to the method of conveyance.

We find, therefore, that the deed to Hatch was valid, and conveyed to him all the right owned by Skye in the lands described, and, consequently, the leasehold interest given by Hatch to Skye is equally valid.

The right of the administrators to recover in the action against Luckman we, therefore, deem complete, and all that remains for our consideration in the case is the amount of damages to be awarded.

It is contended that the measure of damages is not the value of the crops removed, but the rental value of the land on which they were grown. This appears to be the rule where the action is one for ejectment with an accounting for the use and occu-

* Amd. by Laws of 1893, chap. 229.—[REP.]

pation during the time the premises were unlawfully withheld. (Woodhull v. Rosenthal, 61 N. Y. 394; Wallace v. Berdell, 101 id. 13.)

We do not think this rule applies where the action is for the value of the crops removed, as in this action. The crops removed were, by stipulation, worth thirty dollars and eighty cents, for which sum judgment against Luckman is directed.

This brings us to the consideration of the proceeding for a writ of prohibition seeking to restrain the defendants in that action from prosecuting before the Peacemakers' Court of the reservation an action brought by the said Cornelius Carpenter Simon Parker and James Skye. The complainants in that action begun in the Peacemakers' Court set up and allege the death of Thomas Skye, his ownership of the parcels of land in question at the time of his death; that Thomas Skye left no descendants or children eligible to inherit real estate on the reservation, except James Skye; that Phœbe Hatch, his daughter, was and is a Cattaraugus Indian according to the customs of the Indians; that Cornelius Carpenter and Simon Parker are his nephews, and as such administrators of his estate. The complaint sets up the proceedings at the so-called Tenth Day Feast; that said Cornelius Carpenter and Simon Parker, as administrators of Thomas Skye, conveyed to James Skye a parcel designated in the complaint. It alleges the invalidity of the deed given by Skye to William Hatch. It alleges that William Hatch and Phœbe Hatch had wrongfully entered on said premises and removed a quantity of hay. It alleges that Cornelius Carpenter, Simon Parker and James Skye are the owners of all the real estate owned by Thomas Skye, and entitled to the peaceful possession thereof, and concludes by the following prayer for relief, to wit:

"Wherefore these plaintiffs ask that judgment be granted herein awarding to these plaintiffs the full and peaceful pos-

session of all the lands thus held by the said Thomas Skye, including the dwelling house and the hay stack standing within the bounds of the lot designated herein as Schedule A, and that the defendants and all other persons not lawfully thereon, be restrained by the order of this Court from interfering with or interrupting these plaintiffs, in the peaceable possession and occupation of the premises, with the costs of this action against the defendants."

The writ of prohibition is asked not only against the plaintiffs, but against the peacemakers from proceeding in the action.

We think the relators are entitled to the writ.

If the Peacemakers' Court has not been given authority to deal with the questions in dispute, it becomes the plain duty of this court to intervene, and by its mandate arrest further proceedings.

The Peacemakers' Courts on the Allegany, Cattaraugus and Tonawanda Reservations exist by virtue of section 47 of the Indian Law.* It provides that

"The Peacemakers' Court of each such reservation shall have authority to hear and determine all matters, disputes and controversies between any Indians residing upon such reservation, whether arising upon contracts or for wrongs, and particularly for any encroachments or trespass on any land cultivated or occupied by any one of them, and which shall have been entered and described in the clerk's books of records; * * *" but the act provides, "the peacemakers shall in no case award more than one hundred dollars, exclusive of costs, in favor of any party, in any one complaint or suit."

The same section then proceeds to confer on the Peacemakers' Courts of the Allegany and Cattaraugus Reservations certain

* Gen. Laws, chap. 5 [Laws of 1892, chap. 679], § 47, as amd. by Laws of 1893, chap. 229; now Consol. Laws, chap. 26 [Laws of 1909, chap. 31], § 46.—[REF.]

powers not given to the Peacemakers' Court of the Tonawanda Reservation. To these courts it gives the power to grant divorces between Indians, "and to hear and determine all questions and actions between individual Indians residing thereon involving the title to real estate on such reservations."

This power has been purposely withheld from the Peacemakers' Court of the Tonawanda Reservation, but, notwithstanding, the action instituted by and before the defendants in the prohibition action related exclusively to the disputed title to the lands once owned by Thomas Skye. The Peacemakers' Court of the Tonawanda Reservation was given no such authority. Nor does it possess any equity powers. Its powers seem to be confined to cases where a money judgment not exceeding \$100 in amount can be awarded.

That it was never the purpose and intention of the Legislature to confer jurisdiction upon the Peacemakers' Court of the Tonawanda Reservation to pass upon any question where the title to Indian lands is involved is shown by reference to the provisions of section 8 of the Indian Law.* This section, in substance, declares that no one but members of the nation, tribe or band shall reside upon the reservation of each. It further provides that the county judge of the county in which such lands are situated, upon complaint made to him, shall inquire and determine whether the person complained of has unlawfully intruded upon lands of the reservation, and issue his warrant to the sheriff to remove such intruder. Ample and full remedies are provided for such cases, without committing any such authority to the peacemakers, whose jurisdiction is confined to more trivial matters.

The Peacemakers' Court, in entertaining the suit brought in this court, has exceeded all authority, and the writ prayed for should issue.

* Amd. by Laws of 1893, chap. 229; now Consol. Laws, chap. 26 (Laws of 1909, chap. 31), § 8.—[REp.]

In view of the fact that before his death Thomas Skye conveyed the lands owned by him to William Hatch, and we have upheld the validity of that deed, it has become, perhaps, unnecessary for us to add anything touching the rights Phoebe Hatch would have had in the lands as heir of her father, Thomas Skye, had such a conveyance never been made. Nevertheless, in view of the contentions of the defendants and the importance of the question as bearing upon the relations of the parties to the tribe and its members, we are constrained to briefly discuss the propositions raised.

We cannot accept the contention on the part of the defendants that in that event she would have acquired no rights in the lands in question. It is true, by the provisions of section 8 of the Indian Law,* it is provided that

“Except as otherwise provided by law, no person shall settle or reside upon any lands owned or occupied by any nation, tribe or band of Indians, except the members of such nation, tribe or band.”

It is also true that according to ancient custom of the Indians, the clan and tribal relations of an Indian are supposed to follow that of the mother rather than that of the father. This ancient custom comes down from barbaric days when the marital relations were loose and uncertain, and it was often difficult to determine the paternity of a child. Since those times the Indians, and particularly the New York Indians, have progressed in education. They have adopted the ways and life of civilization. They have ceased to be nomadic. They live and maintain themselves by honorable labor in the cultivation of their farms. They have their schools and churches, and in their mode of life differ little from the civilized white man.

By section 3 of the Indian Law the laws of the State relat-

* Amd. by Laws of 1893, chap. 229; now Consol. Laws, chap. 26 (Laws of 1909, chap. 31), § 8.—[REP.]

ing to the capacity to contract marriage, the solemnization of marriage, the annulment of the marriage contract and divorce are made applicable to Indians. The reasons for the recognition and enforcement of the old custom by which a child was deemed to take its clan and tribal relation from the mother rather than the father no longer exists, and we can see no good or sufficient reason why tribal relation in the case of the Indians on the Tonawanda Reservation, as well as on the Cattaraugus and Allegany Reservations, should not be determined by the rule of the common law, by which the lineage of the child follows that of the father.

We are of the opinion that the Legislature of the State, when it passed the law providing that none but members of the tribe or band should have the right to reside upon the reservation lands, had the rule of the common law in mind, and not the old Indian custom, and that the statute must be interpreted by the rule of the common law. This view is confirmed by the statute of the State in reference to the allotment of Indian lands.

By section 7 of the Indian Law it is provided that tribal lands may be divided and partitioned "among the individuals and families of such nation, tribe or band," and further declaring that "No lands occupied and improved by any Indian according to the laws, usages or customs of the nation, tribe or band, shall be set off to any person other than the occupant or his family."

The purpose of these enactments was to protect the reservation lands from intrusion and settlement by white men, and to preserve to the Indians the exclusive occupation of them, and to secure to them and "their families" the exclusive enjoyment thereof.

The Legislature was jealous to protect the interests of the family in the reservation lands—a very wise and just policy.

To hold that Phœbe Hatch, the sole legitimate child of Thomas Skye, is incapable of taking lands left by her father, simply because her mother happened to be from the Cattaraugus Reservation, would be to defeat the plain purpose and intent of the law of the State and a travesty of justice.

It does not appear at just what time the wife of Thomas Skye died, but we are justified in believing that during all her married life she lived on the Tonawanda Reservation with her husband, Thomas Skye, without protest. Phœbe Hatch was born on the reservation and all her life has lived there, and is now the wife of William Hatch, a Tonawanda Indian. She has for years been a teacher in the schools on the reservation, and must be deemed a member of the Tonawanda tribe or band.

We are not without precedent and authority for this view of the case. The questions involved were before this court for consideration and adjudication in the case of *Seneca Nation of Indians v. Jameson*. Mr. Justice DANIELS decided the case and wrote an opinion filed in the Erie county clerk's office in August, 1888, and published in a book* entitled "Indian Problem." The action was brought to recover certain lands on the Cattaraugus Indian Reservation. It appeared that Chauncy C. Jameson was a Seneca Indian who had intermarried with Adelaide E. Jameson, a white woman. He had children by her. Chauncy C. Jameson died, and it was contended there, as in this case, that according to the customs the lineage of the children followed that of the mother, and the children should be considered white persons, and not Indians, and for that purpose incapable of taking lands either under a will or by descent. Justice DANIELS, however, held to the contrary. He held that under the statute authorizing allotments of Indian lands (*Laws of 1843*, chap. 228; *Laws of 1845*, chap. 150) the children of Chauncy C. Jameson had the right to inherit from their father.

* See N. Y. Assem. Doc. 1889, No. 51, pp. 383-385.—[REP.]

In his opinion he said: "This statute has not defined or restricted the family to those persons who should be of unmixed Indian blood, but it has, in the most general manner, secured the enjoyment of property allotted and assigned in this manner to the family, and legal representatives of the deceased Indian, and whether that family may be of the whole blood of the Indian or only of the half blood of the nation who is entitled to be protected in the use and enjoyment of the property under this provision of the statute; for in no other manner can full effect be given to the language of the statute through which the occupancy of the land has been secured to the Indian and his family; and in this family the law in no manner distinguished between Indians of the half blood and Indians of the whole blood. And it follows from these provisions that as the defendant is the son of Chauncy C. Jameson, who received and occupied this property, under an appropriation undoubtedly made of it for the benefit of his ancestors, he is, as a member of his family, entitled to be protected in its possession, and for that reason judgment must be directed in his favor in this action."

The same question was again before this court in the case of *Seneca Nation of Indians v. Lehly*, which was affirmed on appeal by the General Term of this court (*Seneca Nation of Indians v. Lehly*, 55 Hun, 83). In that case Justice DANIELS used the following language: "The offspring of Indians follow the condition of the father, and the decision is not affected by the concession that there is a custom among the Seneca Nation that the lineage of the child follows that of the mother, and is governed by it."

In other words, in face of the concession, custom must give way to law.

In the *Lehly* case the General Term, Justice MACOMBER speaking for the court, said: "It matters not whether the family thus coming into possession of the lands was of the whole

blood or not. The defendant Harriet Lehly, the daughter of Chauncy C. Jemison, is a member of the family, and is entitled to be protected in her possession."

Without hesitation we, therefore, hold that the plaintiffs are entitled to recover in the action against Luckman, and are also entitled to the writ of prohibition prayed for against the peacemakers of the reservation and the complainants in that proceeding.

We have written thus at length in the confident belief that the rules of law above expressed will redound to the permanent good and advancement of the Indians, not only on the Tona-wanda, but upon other reservations.

Let findings be drawn in accordance with the views herein expressed.

**In the Matter of Proving the Last Will and Testament of
MATTHEW J. KEEFFE, Deceased, as a Will of Real and Per-
sonal Property.**

**FLORENCE A. MUSTOR, Appellant; JOSEPHINE P. KEEFFE, Exec-
utrix, etc., of MATTHEW J. KEEFFE, Deceased, Respondent.**

(First Department, March 20, 1913.)

WILL—EXECUTION—ACKNOWLEDGMENT OF SIGNATURE.

Where a will has not been signed by the testator in the presence of either witness he must, with his signature to the will visible, acknowledge the same to each of the witnesses. An acknowledgment to one of the witnesses is insufficient.

Hence, where a testator drew his own will on an ordinary printed form, signed the same at the end thereof, and also wrote his name in the attestation clause merely for the purpose of

identification, an acknowledgment of his signature to one of the witnesses with the will so folded that his signature at the end thereof was not visible, the witness seeing only his signature in the attestation clause, is insufficient and probate will be refused although his signature was properly acknowledged to the other witness.

CLARKE and LAUGHLIN, JJ., dissented.

APPEAL by Florence A. Mustor, contestant, from a decree of the Surrogate's Court of the county of New York, entered in the said Surrogate's Court on the 15th day of August, 1912, admitting to probate a paper propounded as the last will and testament of Matthew J. Keeffe, deceased.

Edward W. Drucker [Richard J. D. Keating with him on the brief], for the appellant.

Maurice B. Rich, for the respondent.

SCOTT, J.—The contestant appellant opposed the granting of the probate upon several grounds, but the only one we consider it necessary to discuss is that which calls in question the sufficiency of the execution of the alleged will.

The facts are simple. The document was drawn by the deceased himself, a layman, upon a printed form such as can be purchased from any law stationer. The blanks were filled in by the testator in his own handwriting, and he signed his name at the end. Following his signature was the usual attestation clause reading: "Subscribed by Matthew J. Keeffe, the testator named in the foregoing will * * *," the name of the testator being written in his own handwriting. There were two witnesses, neither of whom saw the testator sign the document, and who did not themselves witness it at the same time and in the presence of each other. In this respect the recitation in the attestation clause was incorrect.

James L. Keegan, who was the first witness to sign, went to testator's house in the evening, and the testator said to him, "Jim, this is my will; I would like to have you sign it." He then handed the will to Keegan so folded that the latter part of the will proper, the signature and the attestation clause were visible. Keegan testifies that at that time he saw the testator's signature at the end of the will, but did not notice his name written into the attestation clause. He signed at the bottom of the attestation clause without reading it.

John S. Simons was the second witness. His testimony is that he called on testator at his house, and that after some conversation on other subjects the testator passed the paper over to him and said, "John, there is my will, will you sign it?" Simons said, "Yes, I guess so. * * * I suppose it is a will." Testator said, "You see my signature." Simons replied, "Yours and Keegan's." Testator said, "Yes," and Simons said, "They are good enough for me," and thereupon signed. Upon further examination of this witness it clearly appears just what happened. When the deceased handed the paper to Simons it was so folded that the testator's signature at the end of the will was not visible, only the attestation clause being visible. The witness did not see Keeffe's signature at the end of the will, but saw only the attestation clause, and it is testified positively by him that what he referred to in the earlier part of his examination as Keeffe's signature, and the only thing of the kind which he saw was Keeffe's name written into the attestation clause.

Under this state of facts, as to which there is no contradiction or manner of doubt, we are of the opinion that the probate cannot be upheld. The will must be sustained, if at all, under the 2d sentence of subdivision 2 of section 21 of the Decedent Estate Law (Consol. Laws, chap. 18; Laws of 1909, chap. 18), reading as follows: "Such subscription shall be made by the

testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses." (See, also, 2 R. S. 63, § 40, subd. 2.)

The will was not signed in the presence of either witness. To be validly executed, therefore, the subscription, not the will, must have been acknowledged to each of the witnesses. An acknowledgment to one will not do.

The rule as to acknowledgment is laid down in *Matter of Laudy* (148 N. Y. 403, 407), as follows: "In *Matter of the Probate of the Last Will and Testament of James Mackay, Deceased* (110 N. Y. 611), it was held that subscribing witnesses to a will are required for the purpose of attesting and identifying the signature of the testator; and in order to do this it is essential that they should see the testator subscribe his name, or that *with the signature visible* to them he should acknowledge it to be his."

Matter of Mackay (110 N. Y. 611) was much like the present. The testator called the witnesses and presented to them a paper which he said was his will and that he wanted them to sign it. It was folded in such a way that they did not see the signature. Held, that the acknowledgment was insufficient, the court saying, "subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it." (Citing, also, to the same effect, *Lewis v. Lewis*, 11 N. Y. 221, and *Mitchell v. Mitchell*, 16 Hun, 97; *affd.*, 77 N. Y. 596.) A dictum to the contrary in *Willis v. Mott* (36 N. Y. 486, 491) is distinctly overruled.

This case is distinguishable from those in which one witness cannot distinctly remember that all the necessary formalities were complied with. (*Matter of Turell*, 166 N. Y. 330.) Here the evidence is direct and positive that, as to one witness, the necessary formality was not complied with. The fact that

the testator's name was written in the attestation clause in his own handwriting, and that the name was visible to the witness Simons when he signed as witness does not satisfy the requirement that the *signature* must be visible, for it is quite evident that that word was not intended by the testator as his signature to the will.

In *Matter of Booth* (127 N. Y. 109) the testatrix, a resident of New Jersey, attempted to make a holographic will commencing "If I, Cecelia L. Booth, should die," etc. She did not sign it at the end. The court assumed that the common law prevailed in New Jersey, and recognized the rule that at common law if a person wrote his name anywhere in the body of a will, with intent to execute it, the signature was as valid as if subscribed at the end. It was held, however, that in order to have this effect the name must have been written with intent that it should act as a signature. The court said: "Wherever the name of a testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it, otherwise it is without force. When a testator, or the maker of a contract, subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent." The internal evidences, derived from the document itself, are convincing that KEEFFE had not written his name in the body of the attestation clause with the intent that it should be the signature to his will. He had already signed it at the appropriate place at the end of the document. The insertion of his name in the attestation clause

was evidently merely for the purpose of identification. It cannot be regarded as his signature to the will which, under the statute, it was essential should be visible to each witness at the time he witnessed the document.

The decree of the Surrogate's Court must be reversed, and the prayer of the petitioner denied, with costs and disbursements in this court to the appellant, payable out of the estate.

INGRAHAM, P. J., and McLAUGHLIN, J., concurred; CLARKE, J., dissented; LAUGHLIN, J., dissented on opinion of Surrogate COHALAN.

Decree reversed and prayer of petitioner, denied, with costs and disbursements in this court to appellant, payable out of the estate.

WHEATON H. SCHOONMAKER, Appellant, v. ERNEST L. GRAY et al., as Executors of PALMER R. WHEATON, Deceased, Respondents.

PROBATE OF WILL—CONTEST BY HEIR AT LAW—VALIDITY OF AGREEMENT BY LEGATEE AND PROPONENT OF WILL TO ACCEPT LESS THAN AMOUNT GIVEN HIM BY THE WILL IN CONSIDERATION THAT CONTEST OF PROBATE BE STOPPED AND THAT ESTATE BE SETTLED IN A CERTAIN COUNTY—QUESTIONS OF FACT FOR THE JURY.

There is no rule of public policy which prevents those interested in an estate from agreeing upon the manner of its distribution so as to avoid the expense and trouble of litigation.

An agreement by a legatee and proponent of a will for division of the estate less favorable to him than that provided for by the will is upon sufficient consideration where a contestant agreed to stop a contest, not to bring other actions and to allow the estate to be settled in the county where probate proceedings were then pending.

Plaintiff filed objections to a will under which defendant's testator was an executor and a legatee, both being heirs at law and next of kin of the decedent. Negotiations were had for settlement, in the course of which a paper was signed by plaintiff and defendant's testator to the effect that decedent was of unsound mind at the time of the execution of her will, and that the estate should be distributed as if testatrix had died intestate. This was followed by a conversation between plaintiff and defendant's testator in which, plaintiff asserts, a guaranty was made to him of the interest he claimed in the estate. Plaintiff did not appear on the day to which the probate had been adjourned, and the surrogate, refusing to recognize the paper referred to, admitted the will to probate. Plaintiff brings action to recover for breach of the alleged agreement to guarantee to him his distributive share of the estate in controversy. *Held*, on examination of the facts, that the question whether or not the agreement was made on the assumption by the parties that the surrogate would refuse probate of the will on the writing which had been signed by them, was the issue in the case and it was for the jury to say which inference was justified by the evidence.

Schoonmaker v. Gray, 148 App. Div. 908, reversed.

(Submitted April 2, 1913; decided April 22, 1913.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 12, 1912, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The plaintiff and the defendants' testator were two of the heirs at law and next of kin of Lucena Briggs, deceased, and as such would each have been entitled to one-eighth of her estate if she had died intestate. She, however, left an alleged will under which the plaintiff was to receive nothing and the defendants' testator was to receive substantially one-fourth of the estate after deducting two small legacies of \$500 and \$300 respectively. The said testator was named as one of the executors and offered the will for probate in Delaware county. The plain-

tiff interposed objections to the probate in Delaware county on the ground that the decedent was a resident of Albany county at the time of her death, and also alleged that the decedent did not possess testamentary capacity at the time of the execution of the instrument offered for probate, and that its execution was procured by the exercise of undue influence. Thereupon, the defendants' testator undertook to effect a compromise and for that purpose called a family council, at which the plaintiff and all others interested were present except a sister of the decedent and the two legatees who were to receive under the will said sum of \$800. It was proposed at that conference not to have the will probated and to distribute the estate as in case of intestacy. The plaintiff said that "it made no difference what arrangement was made if only he got his share with the rest." The defendants' testator agreed to satisfy the sister who was not present, and two others agreed to pay the legacies of \$800 to the two legatees not present. An agreement having been reached, those present went to a notary to have it put in writing. The defendants' testator outlined what they had arranged to do thus: "to distribute the will," evidently meaning the estate, "the same as if she had died intestate, and that the other heirs was (*sic*) to share equally." The notary drew up a writing which recited the death of the alleged testator, the petition for probate of the will, the filing of objections thereto by the plaintiff and concluded thus: "Now it is hereby conceded by the parties interested in the said estate as follows:

"*First.* That at the time of the death of the said Lucena Briggs, she was a resident of the County of Delaware, New York.

"*Second.* That at the time of the execution of the said instrument, the said Lucena Briggs was incompetent to execute the same and was of unsound mind."

All present signed and acknowledged the paper. One of

those present asked the notary, "If there wasn't some way that they could guarantee him" (meaning the plaintiff) "his interest so that he would be satisfied to drop the contest," but the notary said that "it couldn't well be put in." Subsequently, and before the family gathering had broken up, the plaintiff expressed his dissatisfaction with the arrangement, because he did not think it was binding, and his intention of going on with the contest, and later the following conversation occurred between the plaintiff and the defendants' testator as related by the witness to whom that expression of dissatisfaction was made.

"Wheaton Schoonmaker says, 'Uncle P. R.' as he called him, 'will it be necessary for me and my lawyer to go to Delhi May the 4th, the adjourned day of the hearing?' Palmer didn't give any answer. Said I, 'Uncle P. R., what Wheaton wanted to know is, will you guarantee him his mother's share of the Lucena Briggs estate the same as if she had died without a will, if he don't appear in Delhi?' He says 'I will, if he will stop his lawing, discharge his lawyers, not commence any more actions, not appear at Delhi and let me settle the estate in Delaware county.' Wheaton Schoonmaker says, 'I will do it if you do as you say.' 'I will,' says he, 'I will, and we will shake hands on it.' And he stepped up and they shook hands. Then we started on towards Ravena, and he says, 'I am glad that we have been able to settle this in a way that we can all be friends.' We got on about where the Westerlo road strikes the other at the fork of the road, and Wheaton Schoonmaker says, 'Uncle P. R. how will it be if Ester Showers won't stand for this arrangement?' He says, 'That won't make any difference, you will get your share.'"

The plaintiff did not appear on the adjourned day of the probate proceedings. The defendants' testator appeared with the witnesses to the will, and produced the paper signed as aforesaid, which the surrogate refused to recognize. The wit-

nesses to the will were then sworn and examined, and a further adjournment taken. A proposed agreement was prepared for the legatees and next of kin to sign according to which the will was to be admitted to probate and the estate distributed as in case of intestacy, and the defendants' testator took it to have it signed, but upon reflection concluded that, as the surrogate had refused to recognize the paper previously signed, he would go on with the probate proceedings and decline to recognize the arrangement that had been made as binding. The plaintiff's counsel was thereupon notified of the conclusion that had been reached, and that on the adjourned day he might if he wished, cross-examine the subscribing witnesses and go on with the contest. This action is brought for breach of the alleged agreement to guarantee the plaintiff "his mother's share of the Lucena Briggs estate the same as if she had died without a will."

George H. Witbeck for appellant. The contract made on April twenty-first is supported by a valid consideration. (Rector v. Teed, 120 N. Y. 586; Spellnor v. Friedman, 130 N. Y. 421; Anson on Contracts, 89; Farmers' Bank v. Blau, 44 Barb. 652; Clark v. Lyon, 38 Misc. Rep. 516; Palmer v. North, 35 Barb. 294.) The contract made on the morning of April twenty-first is not a collateral promise to answer for the debt of another and it is not within the Statute of Frauds. (Loomis v. Lake Shore R. R. Co., 182 N. Y. 373; Roy v. Judson, 24 N. Y. 64; Bishop on Cont. 537; Crook v. Scott, 65 App. Div. 139; Packer v. Berton, 95 Am. Dec. 246; Mechanics' Bank v. Stettheimer, 116 App. Div. 198; Williams v. Bedford, 63 App. Div. 278; Frorhi v. Tivelli, 92 N. Y. Supp. 784.) A nonsuit should not have been granted. The case should have gone to the jury. (Schneider v. Second Ave. R. R. Co., 39 N. Y. S. R. 370; 133 N. Y. 583; Forker v. Brown, 10 Misc. Rep. 161; Johnson v. Thorn, 27 Misc. Rep. 771.)

C. L. Andrus for respondents. No contract was established on the trial enforceable against defendants' testator and the nonsuit was proper. (*Larabee Co. v. Crossman*, 100 App. Div. 499; *Herter v. Mullen*, 159 N. Y. 44; *B. & L. L. Co. v. Bellevue L. & I. Co.*, 165 N. Y. 254.) No recovery can be based upon the alleged agreement of April twenty-first, under which plaintiff seeks to recover. (*Pendleton v. Pendleton*, 1 S. C. 95; *Wood v. Edwards*, 19 Johns. 205; *Silvernail v. Cole*, 12 Barb. 685; *Marie v. Garrison*, 83 N. Y. 14; *Gundlich v. Hensler*, 23 Wkly. Dig 145; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Carpenter v. Taylor*, 164 N. Y. 177; *Robinson v. Jewett*, 116 N. Y. 40.)

MILLER, J.—There can be no doubt that there was sufficient consideration to support the agreement. The defendants' testator was one of the proponents of the will, and as legatee was entitled to virtually one-fourth of the estate. As next of kin he would have received the same as the plaintiff, one-eighth. He wished to avoid the contest, and the plaintiff's agreement to stop the contest, not to bring any other actions, and to allow him to settle the estate in Delaware county was quite sufficient to support his agreement that the plaintiff should receive the share of the estate which he would have been entitled to in case of intestacy. The agreement was not one to answer for the debt or default of another, as is said by the respondent, but was an original promise. Language used by laymen is not to be interpreted according to its strict legal meaning. It is suggested that the agreement was void as against public policy, but we know of no rule of public policy which prevents those interested in an estate from agreeing upon the manner of its distribution so as to avoid the expense and trouble of litigation.

The real question in the case was whether the agreement was made on the assumption by the parties to it that the surrogate

would refuse probate of the will on the writing which had been signed by them, and we are of the opinion that that was a question of fact for the jury. Standing alone, the conversation relied upon was sufficient to establish a valid agreement supported by a sufficient consideration. But, of course, it is to be construed not as an isolated transaction, but as a part of what had preceded it. Thus construed, we think that two possible inferences are permissible, 1, that the promise was exacted and given on the assumption that the surrogate would deny probate on the writing previously signed by the parties, and for the purpose of assuring the plaintiff that the defendants' testator would not, if the plaintiff did not appear on the adjourned day, undertake to prove the will regardless of the writing; 2, that the parties, being uncertain whether the writing would prove effectual, the plaintiff exacted, and the defendants' testator gave, the further promise as an assurance that in any event the plaintiff should receive his distributive share of the estate, the same as in case of intestacy. Of course, on the first inference, there was no breach of contract on the part of the defendants' testator, as performance was prevented by an act for which he was not responsible. But on the second inference he was answerable to the plaintiff for the latter's distributive share of the estate as in case of intestacy, whether the writing was approved and acted upon by the surrogate or not. It was for the jury to say which inference was justified by the evidence.

The judgment of the Appellate Division and of the trial court should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., WILLARD BARTLETT, HISCOCK, CHASE, CUDDEBACK and HOGAN, JJ., concur.

Judgment reversed, etc.

CHARLES H. VAN NESS, as Executor of LE ROY WHITAKER, Deceased, Appellant, v. J. ANDREW KENYON, Respondent.

DECEDENT'S ESTATE—LIMITATION OF ACTION ON CLAIM REJECTED BY AN EXECUTOR—UNCOMPLETED AGREEMENT TO REFER SUCH CLAIM—WHEN SUCH AGREEMENT DOES NOT ESTOP EXECUTOR FROM SETTING UP SHORT STATUTE OF LIMITATIONS AGAINST SUCH CLAIM—WHEN SUCH STATUTE A BAR TO A COUNTERCLAIM SET UP AGAINST CLAIM OF ESTATE.

Defendant having made a claim against the estate of which plaintiff is executor, plaintiff signed and served upon him the following notice: "You will please take notice that I doubt the justice and validity of your claim of \$748.00 against the above named estate, and I hereby dispute the same, and offer to refer it under the statute to some suitable and proper person as referee, to be approved by the surrogate, to hear and determine the same." *Held*, sufficient under section 1822 of the Code of Civil Procedure for the purpose of setting in motion the short Statute of Limitations.

After the notice disputing defendant's claims was served by the plaintiff no proceedings were actually taken to enforce them until this action was commenced; but, after service of the notice, a verbal agreement was made by the parties for a reference under section 2718 of the Code of Civil Procedure, and it was left to the defendant's attorney to prepare the proper papers for such reference. This, however, he did not do, although nearly three months elapsed between the date when it was thus agreed and the expiration of the short period of limitations, and thereafter the plaintiff insisted upon that statute as a defense to the claims. *Held*, that the parties contemplated that their oral stipulations should be consummated and made effective only by incorporation into written instruments; that the time was not extended thereby within which defendant must institute proceedings on his claim, and that the plaintiff is not estopped from setting up the statute.

The bar of the statute (Code Civ. Pro. § 1822) is effectual not only in a proceeding against an estate but is operative against a claim pleaded as a setoff in an action brought on behalf of an estate and a claim which has been properly rejected may not be used by way of counterclaim after the expiration of the statutory period.

Van Ness v. Kenyon, 151 App. Div. 948, reversed.

(Argued April 4, 1913; decided April 22, 1913.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 10, 1912, affirming a judgment in favor of defendant entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harry L. Russell for appellant. The notice served upon the respondent is sufficient, within the terms and meaning of section 1822 of the Code of Civil Procedure, to start in operation the short Statute of Limitations therein provided. (*Matter of Jacobs*, 109 App. Div. 293; *Matter of Mudge*, 118 N. Y. Supp. 568; *Dawbarn v. Fleischmann*, 146 App. Div. 57; *U. C. Sav. Inst. v. Young*, 161 N. Y. 23; *Miller v. Longshore*, 147 App. Div. 214; *Clark v. Scovill*, 191 N. Y. 8; *Matter of Eichman*, 33 Misc. Rep. 322; *Matter of Scheetz*, 62 Misc. Rep. 166; *Snell v. Dale*, 17 N. Y. Supp. 576; *Cornes v. Wilkes*, 79 N. Y. 129.)

Herbert Van Kirk for respondent. Under the notice and circumstances of this case, the two counterclaims are not barred by the Statute of Limitations in section 1822 of the Code of Civil Procedure. (*Clark v. Scoville*, 191 N. Y. 8; *Dawbarn v. Fleischmann*, 146 App. Div. 57; *Nat. Bank v. Speight*, 47 N. Y. 668; *U. C. S. Inst. v. Young*, 161 N. Y. 33; *Hoyt v. Bonnet*, 50 N. Y. 543.) The plaintiff is estopped from insisting that his notice was a rejection under section 1822 and that the short statute has run. (*Payne v. Burnham*, 62 N. Y. 69; *Nat. Bank v. Speight*, 47 N. Y. 668; *Calahan v. McClure*, 47 Barb. 206.)

Hiscock, J.—The plaintiff, as executor of one Whitaker, brought this action to recover on three several claims which arose in behalf of the estate represented by him subsequently to the death of his testator. Two of these claims were not in any

way disputed by the defendant, but he set forth in his answer three counterclaims alleged to have accrued against the testator during his lifetime, and upon which the verdict of the jury and the judgment now appealed from was and is in his favor. Plaintiff did not challenge the right of defendant to prosecute the said counterclaims in this action if otherwise valid, but by his reply contended and now urges that the same claims alleged as two of the counterclaims were presented to him as such executor as aforesaid after notice to creditors to present claims and that he rejected the same, and that at the time of the commencement of this action they were barred by the so-called short Statute of Limitations because no agreement had been made and filed permitting the surrogate to pass thereon on the settlement of the executor's accounts, and no action thereon commenced as provided by section 1822 of the Code. It is conceded that a notice disputing such claims was served by the plaintiff, and that no proceedings were actually taken to enforce them until this action was commenced, but it does appear that after the alleged rejection of the claims a verbal agreement was made by the parties for a reference under Code of Civil Procedure, section 2718, and it was left to the defendant's attorney to prepare the proper papers for such reference. This, however, he did not do although nearly three months elapsed between the date when it was thus agreed and the expiration of the short period of limitations, and thereafter the plaintiff insisted upon such statute as a defense to the claims.

The questions, therefore, are presented whether plaintiff did make an effective rejection of the claims, and if so whether he is prevented by these negotiations for a reference or otherwise from invoking the statute.

Section 1822 of the Code, so far as applicable, provides: "Where an executor or administrator disputes or rejects a claim against the state of a decedent, exhibited to him,

* * * unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator as provided by section twenty-seven hundred and forty-three, the claimant must commence an action for the recovery thereof against the executor or administrator, within six months after the dispute or rejection, * * *; in default whereof, he, and all the persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property."

Section 2718 of the Code, so far as applicable, provides: "The executor or administrator at any time after the granting of his letters, may insert a notice * * * requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor. * * * If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the supreme court * * * an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such order the proceedings shall become an action in the supreme court."

The notice which the plaintiff signed and served upon the defendant concerning his demands read as follows:

"To J. ANDREW KENYON:

You will please take notice that I doubt the justice and validity of your claim of \$748.00 against the above named estate, and I hereby dispute the same and offer to refer it under the statute to some suitable and proper person as referee, to be approved by the surrogate, to hear and determine the same."

It is in substance argued that this was not sufficient under section 1822 for the purpose of setting in motion the short Statute of Limitations, but that the claimant was fairly entitled to regard it as a notice under section 2718 whereby the executor simply indicated a doubt concerning the claim and a desire to refer it, and which action drew after it no unusual Statute of Limitations.

We are unable to agree with this view.

Section 1822 of the Code provides a penalty of the short Statute of Limitations for a case where the executor or administrator "disputes or rejects" a claim, and no agreement is made for a hearing by the surrogate. Wherever the section deals with the contingency in question it speaks of a dispute *or* rejection of a claim. The two words are used as synonymous in describing the hostile attitude and action of an executor or administrator, and in fact they are inevitably so. If an executor disputes a claim it quite necessarily follows that he does not admit its validity but on the contrary rejects it. Likewise, if he rejects it, he certainly disputes it in a very practical way.

The notice which was served, independent now of the clause offering to refer, fully complied with the requirements of this section. The executor states in reference to the claim, "I hereby dispute the same." This certainly was a literal compliance with the section in question and a perfectly plain statement of his attitude, and this compliance and attitude were in no manner limited or weakened by the introductory statement of the executor that he doubted the justice and validity of the claim, because from a legal standpoint such doubt would necessarily be implied in a dispute or rejection thereof. Therefore, we have an express and sufficient dispute of the claim invoking the operation of the short Statute of Limitations, and this result was not in my opinion at all impaired because the executor, still further, offered to make a reference of the claim. There may be various

reasons why an executor should prefer a reference of a disputed claim rather than some other course by which to determine its validity, and I see nothing which requires us to construe a dispute or rejection under section 1822 as inconsistent with or exclusive of an offer to refer under section 2718. If the parties had duly agreed upon such reference it would have become an action in the Supreme Court and thus the requirements of section 1822 would have been satisfied. (Section 2718.) The important, controlling fact is that because he doubted the justice and validity of defendant's claim the executor explicitly and plainly disputed the same and that circumstance of dispute set in operation the Statute of Limitations which is now invoked, in the absence of escape therefrom by other procedure specified in the Code.

Nothing is found in the authorities cited in behalf of the defendant which forbids these views. The most that can be gathered from them is the principle, conceded and undisputed, that a notice of rejection or dispute must be unequivocal and plain. On the other hand, I think that the sufficiency of the notice for the purposes now urged is fully established. (*National Bank of Fishkill v. Speight*, 47 N. Y. 668; *Snell v. Dale*, 43 N. Y. St. Repr. 498; *Clark v. Scovill*, 191 N. Y. 8.)

In the last case the notice served by the executors like the present one contained an offer to refer the claim, and it was not believed that this in any way affected the efficacy of the notice. As was pointed out by Judge CHASE in his opinion in behalf of the court, the notice of rejection enforced upon the claimant the pursuit of one of three remedies for the protection of his claim. He might accept the offer of the executor or administrator and make a reference, or within six months after the rejection of the claim commence an action, or within the same period enter upon a written consent that the claim be heard by the surrogate.

It is, however, urged that even if the notice was sufficient, the offer to refer, and negotiations for a reference which took place after service of the notice between the plaintiff and defendant, or their respective representatives, now estop plaintiff from setting up the short Statute of Limitations. The facts do not establish any such estoppel. As already stated, a verbal agreement was made for a reference of the controversy to a person named, but it was further agreed that the papers necessary to carry this stipulation into effect should be prepared by the defendant's attorney. Three months later and after the statute had run, the latter came with the papers thus prepared, but the plaintiff refused to sign and insisted upon the statute. The Code requires a written agreement of reference, and the parties clearly contemplated that their oral stipulations should be consummated and made effective only by incorporation into written instruments. Their conduct does not rebut this idea; it expressly confirms it. Neither was anything done or said in these inchoate negotiations which sustains the thought that an unlimited time might be taken for actually making a legal and binding reference, and thereby the time extended within which defendant must institute proceedings on his claim. There is no element of real estoppel so far as I can discern, for it does not appear that the defendant has done or refrained from doing anything because of the incomplete parol arrangement.

Lastly it is contended that even though the short Statute of Limitations became operative it only prevented defendant from instituting affirmative proceedings for the enforcement of his claims and did not prevent him from utilizing them *pro tanto* as an offset for the purpose of extinguishing claims asserted by the estate against him. This view also we are unable to accept.

One of the purposes of the short Statute of Limitations is to compel claimants promptly to seek enforcement of their claims when rejected in order that there may be a speedy ascer-

tainment at least of the liabilities of the deceased. This object would not be subserved but frustrated if the possessor of a disputed claim might remain inactive for the statutory period or ever longer and then attempt to enforce his demand in whole or part by advancing it as an offset to some claim made by the estate. For most practical purposes it would make no difference whether a claimant secured an affirmative judgment upon his demand or merely used it for offsetting and reducing assets of the estate. In the second place, the language of the Code on a fair construction is in my opinion opposed to any such distinction. It provides that under the conditions and default mentioned, a claimant shall be "forever barred from maintaining such action thereupon (upon his rejected claim), and from every other remedy to enforce payment thereof out of the decedent's property."

The Code provides that a defendant may set up in his answer a counterclaim, and a counterclaim is defined (Section 501) as tending "in some way to diminish or defeat the plaintiff's recovery." When the claimant sets forth in his answer a counterclaim although he only seeks to utilize it in offsetting and defeating in whole or part a valid claim existing in favor of the estate, it seems obvious that he is to the extent mentioned pursuing a remedy whereby he enforces payment out of the decedent's property. His counterclaim or setoff is satisfied by crediting it on the adverse claim and in that way enforced out of the assets of the estate.

While there has been found no decision in our own state upon this precise point, I think that the law is settled upon an analogous question so closely related to the present one as to leave no doubt concerning the decision which should be made.

The ordinary Statute of Limitations concerning contract debts, for instance, provides "actions must be commenced within" six years. This language, it will be noted, is much

less comprehensive in its limitations than that employed in section 1822. It simply limits the commencement of actions, and yet, so far as I am aware, it has never been believed that a promissory note which was so barred by the Statute of Limitations that an action could not be maintained upon it, might still be set up and enforced by way of counterclaim and offset. The contrary has been held and assumed. (*Ruggles v. Keeler*, 3 Johns. 263; *De Lavallette v. Wendt*, 75 N. Y. 579, 583; *Dieffenbach v. Roch*, 112 N. Y. 621, 627. See, also, 2 Wood on Limitations, p. 722.)

In other jurisdictions authorities are to be found deciding practically the same question now argued and adversely to the respondent's contention. *Emson v. Allen*, 62 N. J. L. 491; *Bell's Admr. v. Andrews*, 34 Ala. 538; *Patrick v. Petty*, 83 Ala. 420; *Jones v. Jones*, 21 N. H. 219; *Lyon v. Petty*, 65 Cal. 322.)

These views lead to a reversal of the judgment appealed from and a new trial, costs to abide event, unless respondent consents within twenty days to the disallowance of his second and third counterclaims and the award of a judgment of \$59.20 in favor of plaintiff, in which case judgment is so ordered, with costs to the appellant in all courts.

CULLEN, Ch. J., WILLARD BARTLETT, CHASE, CUDDEBACK, HOGAN and MILLER, JJ., concur.

Judgment accordingly.

STANLEY DWIGHT, as Substituted Trustee under the Will of
TIMOTHY DWIGHT, Deceased, Plaintiff, v. HARRISON J. GIBB
et al., Respondents, and LILLIAN C. JEFFREY et al., Appel-
lants, Impleaded with Others.

**WILL—DEVOLUTION OF RESIDUARY ESTATE—APPLICATION OF WORDS
“LEGAL REPRESENTATIVES”—DIVISION OF RESIDUARY TRUST FUND
PER STIRPES AND NOT PER CAPITA.**

A testator directed that his residuary estate be divided into six parts, and that three of such parts be held in trust for three daughters, that said three parts should be held severally during the natural life of said daughters and upon the further trust as follows: “Upon the decease of my said daughters respectively, to pay over, transfer and deliver the principal of the part aforesaid, so holden in trust for the use of the daughter so respectively deceased, to the child or children of such deceased daughter respectively; and in default of such child, or children, then to my other children named in this will, and to their legal representatives in equal proportions.” *Held*, that the testator used the words “and to their legal representatives” in the sense of lineal descendants, as in the Statute of Distributions (Decedent Estate Law, Cons. Laws, ch. 13; L. 1900, ch. 18, § 98, amd. L. 1909, ch. 240). One of the daughters having died without descendants, and it appearing that the descendants or next of kin of the testator are of unequal degrees of kindred, *held*, that the testator intended by the use of the words “legal representatives” *his* legal representatives, and hence the trust fund must be apportioned according to their respective stocks. Each group of grandchildren must, therefore, take the share that their parent would have taken, if living.

Under the provisions of section 1355 of the Code of Civil Procedure an order made by the Appellate Division on an appeal must be first entered in the office of the clerk of that court, who transmits a certified copy thereof to the clerk of the county where the judgment was entered, and upon such certified copy of the order and on the papers upon which the appeal was heard such county clerk enters judgment which is the judgment of the Appellate Division, and an appeal is properly taken therefrom to this court. It is not necessary to appeal from the order upon which

the judgment was entered. (*Matter of Union Trust Co.*, 172 N. Y. 494, distinguished, the appeal having been there taken under section 2585 of the Code of Civil Procedure.)

Dwight v. Gibb, 150 App. Div. 573, affirmed.

(Argued April 1, 1913; decided April 15, 1913.)

APPEAL from so much of a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 29, 1912, as modifies a judgment entered upon the report of a referee and directing distribution of a trust fund.

The facts, as so far material, are stated in the opinion.

Joseph Fisher for appellants. Inasmuch as the appellants and the respondents, constituting collectively the "legal representatives" of the testator's daughter Caroline, are all related in equal degree to her, they must *inter se*, share equally in the distribution. (Cons. Laws, ch. 13, § 98, subd. 10; *Schmidt v. Jewett*, 195 N. Y. 486; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Phelps v. Cameron*, 109 App. Div. 798; *Bassett v. Wells*, 56 Misc. Rep. 81; *Matter of Bauerddorp*, 77 Misc. Rep. 655; *Fowler's Decedent Estate Law*, 446, 447, 451, 453, 454; *Matter of Prote*, 54 Misc. Rep. 495; *Fletcher v. Severs*, 10 N. Y. Supp. 6; *Adams v. Smith*, 20 Abb. [N. C.] 60; *Hill v. Nye*, 17 Hun, 457.) The appeal is properly taken from the judgment. (Code Civ. Pro. § 190; *Van Arsdale v. King*, 155 N. Y. 325; *N. Y. Security Co. v. Saratoga G. & El. L. Co.*, 156 N. Y. 645; *Stevens v. C. Nat. Bank*, 162 N. Y. 253; *Derleth v. De Graff*, 104 N. Y. 661; *Kilmer v. Bradley*, 80 N. Y. 630; *Huda v. American Glucose Co.*, 151 N. Y. 549; *Becker v. Koch*, 104 N. Y. 394; *D., L. & W. R. R. Co. v. Burkard*, 109 N. Y. 648.)

John A. Garver for respondents. The appeal should be dismissed. (*Matter of Union Trust Co.*, 172 N. Y. 494.) The

distribution should be *per stirpes*. (2 Bouv. Law Dict. 650; 2 Black. Comm. 217; 2 Kent's Comm. 425; Fowler's Decedent Estate Law, 368, 451.) Under subdivision 10 of section 98 lineal descendants take as next of kin and not by representation. (4 Kent's Comm. 425.)

CHASE, J.—Timothy Dwight died in 1857 leaving a will, which was duly probated in 1858. He directed that his residuary estate be divided into six parts, and that three of such parts be held in trust for three daughters. By his will he provided that said three parts should be held during the natural life of said daughters severally and upon the further trust as follows: "Upon the decease of my said daughters respectively, to pay over, transfer and deliver the principal of the part aforesaid, so holden in trust for the use of the daughter so respectively deceased, to the child or children of such deceased daughter respectively; and in default of such child, or children, then to my other children named in this will, and to their legal representatives in equal proportions."

On a former appeal in this case it was held (*Dwight v. Gibb*, 145 App. Div. 223, 227) that the testator used the words "and to their legal representatives" in the will as above quoted "in the same sense they are used in the Statute of Distributions (Decedent Estate Law [Consol. Laws, chap. 18; Laws of 1909, chap. 18], § 98, as amd. by Laws of 1909, chap. 240),—lineal descendants." It is assumed on this appeal that such is the true meaning of such words.

The three daughters named in said will were Caroline Eleanor, Joanna and Grace E. The testator left two sons, Timothy Trowbridge Dwight, who died in 1889 unmarried, and Stanley Dwight, who is living, and, as substituted trustee, is the plaintiff in this action.

Caroline Eleanor married a person by the name of Jeffray

and died in 1873 leaving three children, all of whom died prior to 1909; one died unmarried; another died leaving two children, the defendants Harrison Jeffray Gibb and Charles Alexander Gibb, and the third died leaving five children, the appellants herein. The daughter Joanna married a person by the name of Berry and died in 1880 leaving four children who are defendants herein. The daughter Grace E. married a person by the name of Schoett, and died September 25, 1909, without descendants.

This action is brought by the substituted trustee for an accounting and for a distribution of the trust fund which was held for the benefit of Grace E.

The Special Term held that such trust fund should be divided into three parts, one of which should be paid to said Stanley Dwight; one of which should be divided in equal parts among the children of Joanna Berry, and the third of which should be divided in equal shares among the grandchildren of Caroline Eleanor Jeffray. The grandchildren Gibb appealed from such judgment to the Appellate Division of the Supreme Court and the judgment of the Special Term was modified by directing that the one-third of such trust fund divided among the grandchildren of Caroline Eleanor Jeffray should be divided *per stirpes* and not *per capita*. This appeal is brought from so much of the judgment of the Appellate Division as modified the judgment at Special Term. The only question involved on this appeal is whether the one-third of the trust fund to be divided among the grandchildren of Caroline Eleanor Jeffray shall be divided between them *per stirpes* or *per capita*.

It is provided by subdivisions 10 and 11 of section 98 of the Decedent Estate Law (Cons. Laws, ch. 13), as follows:

"10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

"11. When such descendants, or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled."

The testator intended by the use of the words "legal representatives" in that clause of the will from which we have quoted—*his* legal representatives. We agree with the Appellate Division, in holding that "what is involved is the gift over of the whole share which was put in trust for Grace's benefit" and the clause quoted from the will relates to the disposition of such share as a whole.

The descendants or next of kin of the testator are of unequal degrees of kindred and the trust fund must be apportioned among those entitled thereto according to their respective stocks. Each group of grandchildren must, therefore, take the share that their parent would have taken, if living. The judgment of the Appellate Division was right and should be affirmed. The respondents claim that the appeal should be dismissed. We think that it is properly in this court.

This is an action which was brought in the Supreme Court. Final judgment was entered therein upon the report of a referee. An appeal was taken by two of the defendants from specified parts of the judgment to the Appellate Division of the Supreme Court, where the judgment was modified in accordance with the contention of the appellants.

Section 1355 of the Code of Civil Procedure, relating to an appeal to the Appellate Division, among other things, provides: " * * * The order made upon the appeal must be entered in the office of the clerk of the Appellate Division, and a certified copy thereof with the original case or papers upon which

the appeal was heard, filed as provided in section 1353 must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the county clerk shall enter the judgment in his office."

An order was made upon the appeal modifying said judgment appealed from and the judgment as so modified was affirmed, with costs to be paid out of a specified part of the fund mentioned in the judgment. The order was entered in the office of the clerk of the Appellate Division as in said section of the Code provided. A certified copy thereof was transmitted to the clerk of the county where the judgment appealed from was entered, and upon such certified copy of the order and the papers upon which the appeal was heard the county clerk of said county entered judgment in his office modifying the judgment appealed from and affirming such judgment as so modified.

The judgment so entered in the county clerk's office was the judgment of the Appellate Division. It was a final judgment of the Appellate Division entered as such in the office of the clerk of the county because the statute provides that such a judgment shall be so entered. An appeal was properly taken therefrom to this court. It was not necessary to appeal from the order upon which the judgment was entered. Indeed, an appeal from the order would have been of no effect, and a reference in the appeal from the judgment to the order for the purpose of appealing therefrom would have been surplusage.

The decision in *Matter of Union Trust Co.* (172 N. Y. 494) is not in conflict with the decision about to be rendered herein. That was a proceeding commenced in the Surrogate's Court. In an appeal to the Appellate Division from a decree of the Surrogate's Court, it is provided (Code of Civil Procedure, sec. 2585): "In the Appellate Division of the Supreme Court the

order made upon an appeal from a decree or an order of Surrogate's Court must be entered with the clerk of the Appellate Division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the Appellate Division into effect."

It will be seen that in such a case the order made by the Appellate Division is first entered with the clerk of that court, and then a certified copy thereof annexed to the papers transmitted from the court below, upon which the appeal was heard, must be transmitted *to the court* from which the appeal was taken, and "the court below shall enter the judgment or order necessary to carry the determination of the Appellate Division into effect."

The judgment or order so entered by the court is not the judgment or order of the Appellate Division, although entered pursuant to the direction of that court. In such a case there is no provision of statute for an appeal from the judgment or order entered in the county clerk's office direct to this court. An appeal in such case would have to be taken from such judgment to the Appellate Division and then from the order or judgment entered in the Appellate Division to this court.

The judgment should be affirmed, with costs, payable out of the trust fund in controversy.

CULLEN, Ch. J., WILLARD BARTLETT, HISCOCK and CUDDEBACK, JJ., concur; HOGAN, J., not voting; MILLER, J., not sitting.

Judgment affirmed.

In the Matter of the Probate of the Will of CHARLES E. TURNER, Deceased.

BYRON J. TILLMAN, by STEPHEN V. O'GORMAN, His Special Guardian, Appellant; HELEN M. LUCAS et al., Respondents.

WILL—IN THE CONSTRUCTION OF DOUBTFUL PROVISIONS OF A WILL THE WORDS USED MUST BE TAKEN IN THEIR NATURAL SENSE—MEANING AND APPLICATION OF WORD "EACH" IN CLAUSE DISTRIBUTING RESIDUARY ESTATE AMONG NEPHEWS AND NIECES OF TESTATOR.

The natural sense in which words are used, as it appears from judicial inspection, always prevails over both punctuation and capitals, which are regarded as such uncertain aids in the interpretation of written instruments as to be resorted to only when all other means fail.

Testator provided by his will: "*Eleventh*. All the rest and residue and reversion of my estate, both real and personal, I give, devise and bequeath as follows,—to my nephew, Byron J. Tillman of Buffalo, N. Y., one share; to my niece, Grace Joy of Boise, Idaho, one share; and to each of the children of my brother, George Turner, one share, to be divided equally among my said nieces and nephews share and share alike. I direct that the share of any dying with issue surviving shall be paid to such issue and that the share of any dying without issue surviving shall be equally divided among the survivors." A son of the said George Turner died before the testator made his will, leaving a daughter, Blanche Turner, him surviving. *Held*, that assigning to the word "each" its correct signification in the clause in question, viz., "Every one of the two or more composing the whole," the bequest is the gift of one share to every one of the children of the testator's brother George, and can only be carried into effect by treating the entire residuary clause as a bequest *per capita* to the individuals named or indicated therein. *Held*, further, that as the father of the respondent Blanche Turner died before the making of the will he could take nothing thereunder, and, therefore, nothing under the will passed to his daughter. (*De Nottebeck v. Astor*, 13 N. Y. 98, and *Pimel v. Betjemann*, 183 N. Y. 194, distinguished.)

Matter of Turner, 152 App. Div. 231, modified.

(Argued February 27, 1913; decided April 22, 1913.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July, 9, 1912, affirming so much of a decree of the Monroe County Surrogate's Court as construed the 11th paragraph of the will of Charles E. Turner, deceased.

The facts, so far as material, are stated in the opinion.

Albert Haight, John T. Ryan and Stephen V. O'Gorman for appellant. The will herein provides for a division of the residue of decedent's estate into three parts. (Poor v. Considine, 6 Wall. 480; Colton v. Fox, 67 N. Y. 348; Williams v. Jones, 166 N. Y. 522; Morris v. Sickley, 133 N. Y. 456; Lytle v. Beveridge, 58 N. Y. 592; Matter of T. G. & T. Co., 195 N. Y. 339; Pimel v. Betjemann, 183 N. Y. 194; Matter of King, 200 N. Y. 189; Viner v. Francis, 2 Cox Eq. 190.) The surrogate erred in refusing to permit the appellant to prove facts showing the intimate relations existing between the testator, the appellant and the appellant's family from testator's boyhood up to the time of his death. (Scotland County v. Hill, 112 U. S. 183; White v. Hicks, 33 N. Y. 383; McGee v. McGee, 67 Barb. 487; Shultes v. Johnson, 38 Barb. 80.) The learned surrogate erred in holding that Blanche Turner is a legatee herein. (Pimel v. Betjemann, 183 N. Y. 194; Lee v. Gay, 155 Mass. 423; Davis v. Wynn, 80 Ga. 675; Meeker v. Meeker, 4 Redf. 29.)

Milton Noyes for Helen M. Lucas et al., respondents. The will clearly expresses testator's exact intention, viz., to bequeath to "each" of George Turner's children a share of the residuary, equal in amount to the share bequeathed to the appellant. The punctuation is of little value as an aid to true construction, and must otherwise be disregarded if it is in conflict with the testamentary scheme as gleaned from the provisions of the will, or prevents ascribing to words their ordinary

meaning. (Lewisohn v. Henry, 179 N. Y. 352; Matter of Verplanck, 91 N. Y. 439.)

M. H. McMath for Blanche Turner, respondent. The plain and obvious meaning of the language of this 11th paragraph is as construed by the surrogate and by the appellate court. (Eidt v. Eidt, 203 N. Y. 330; Kinkele v. Wilson, 151 N. Y. 277; Lewisohn v. Henry, 179 N. Y. 363.) The construction which gives to Blanche Turner one-eighth of the residuary estate is in accordance with the probable intention of testator. (Matter of Brown, 93 N. Y. 299; Pfeuder v. Depew, 136 App. Div. 640; Low v. Harmony, 72 N. Y. 414.)

Leonard B. Bacon for Security Trust Company of Rochester, as executor, respondent. The construction by the surrogate and by the Appellate Division dividing the residue into eighths was correct. (Kinkele v. Wilson, 151 N. Y. 269.)

WILLARD BARTLETT, J.—The clause of the will which we are called upon to construe in this case reads as follows:

“Eleventh. All the rest residue and reversion of my estate, both real and personal, I give, devise and bequeath as follows, —to my nephew, Byron J. Tillman of Buffalo, N. Y., one share; to my niece, Grace Joy of Boise, Idaho, one share; and to each of the children of my brother, George Turner, one share, to be divided equally among my said nieces and nephews share and share alike. I direct that the share of any dying with issue surviving shall be paid to such issue and that the share of any dying without issue surviving shall be equally divided among the survivors.”

In the portion of the decree which is appealed from the surrogate of Monroe county considered this clause as requiring that the residuary estate of the testator should be divided into

eight equal shares " and that of said eight shares said Byron J. Tillman is entitled to one share; said Grace Joy is entitled to one share; said Helen M. Lucas is entitled to one share; said Belle Shumway is entitled to one share; said Fred Turner is entitled to one share; said Charles C. Turner is entitled to one share; said George W. Turner is entitled to one share and said Blanche Turner is entitled to one share."

Byron J. Tillman is a nephew of the testator; Grace Joy is a niece; and the other persons above mentioned are the children of the testator's brother, George Turner (who died before him), except Blanche Turner, who is the daughter of a deceased son of the said George Turner. This son died before the testator made his will.

The extrinsic facts which were proven upon the hearing before the surrogate in reference to the knowledge of the testator concerning his several relatives and notably his lack of knowledge concerning the children of his brother, George, might suffice to create a doubt as to whether the construction adopted by the surrogate was really expressive of the testator's intention were it not for the plain language of the will and the natural and accepted meaning of the words used in the eleventh clause. It is plainly impossible to adopt the construction contended for by the learned counsel for the appellant unless we disregard the presence of the word "each" in the bequest to "each of the children of my brother—George Turner." This word is correctly defined in Anderson's Law Dictionary as meaning "Every one of the two or more composing the whole." In *State v. Maine Central R. R. Co.* (66 Me. 488, 510) it is said: "Each means every one of any number separately considered." Assigning to it this signification in the clause in question, the bequest is the gift of one share to every one of the children of the testator's brother George and can only be carried into effect by treating the entire residuary clause as a

bequest *per capita* to the individuals named or indicated therein. In support of the argument that the use of the word *each* in the will in no way alters the fact that the bequest was a bequest to the children of George collectively, but two cases are cited: *De Nottebeck v. Astor* (13 N. Y. 98) and *Pimel v. Betjemann* (183 N. Y. 194). In the *De Nottebeck* case the testamentary provision in controversy was as follows: "Also I give to the said six children of my daughter Dorothea, or to such of them as may survive me, one hundred thousand dollars of the public debt of the City of New York, bearing five per cent. interest, usually called the water loan, to be paid to each on attaining their age of twenty-one years." This was held to give to the six children who should survive the testator the one hundred thousand dollars of water stock collectively notwithstanding the limiting phrase "to be paid to each." This result was reached by comparing the clause in question with other bequests in the will, such as "to each of my said grandsons," naming them, and "to each of my said granddaughters." Judge DENIO thought that these bequests showed that where the testator designed to give to each of several persons a legacy of an equal amount of money he had adopted a form of expression which he omitted to use in the clause under consideration, and from this fact the court drew the inference that he did not intend to give each of the six surviving children of his daughter Dorothea the sum of one hundred thousand dollars. In the *Pimel* case, while a direction to executors "to pay to each of my children who shall have arrived at the age of twenty-one years the sum of five hundred dollars" was spoken of as a bequest to a class, the only question there considered was whether the class included persons dead before the making of the will, and we do not find any intimation in the opinion as to the *quantum* receivable by the members of the class. Neither of these decisions, therefore, seems to sustain the position of the appellant.

On the other hand, very much in point the other way is the case of Penney's Estate (159 Pa. St. 346). There the sixth clause of the will after providing for the payment of previously mentioned legatees and the funeral expenses of the testator, including a tombstone, directed that the balance of the estate be converted into cash and "be distributed share and share alike to the following persons if they are living at the time of my death, namely: to my sister Martha J. Houghton, one share, and to my stepdaughter, Olive J. Smith, one share, and to each of my nephews and nieces then living, one share." The auditing judge divided the residuary estate into three parts and distributed one-third to Martha J. Houghton, one-third to Olive J. Smith and one-third to the nieces and nephews. The court of intermediate appeal and the Supreme Court of Pennsylvania held that this distribution was erroneous by reason of the presence of the dominant word "each" in the bequest. "The grammatical meaning of this clause of the sentence," said Mr. Justice MITCHELL, "does not admit of question. The word 'each' separates the class into individuals and is equivalent to the detailed enumeration, 'to A. one share, to B. one share, to C. one share,' etc., for which it was a compendious summary. As well said by the learned court below, had the testator, after directing distribution share and share alike to the following persons, then 'designated all of the legatees by name there would be no room for doubt that he intended a *per capita* distribution.' But by the use of the word 'each' he did in effect designate them all individually as plainly as if he had inserted their several names."

We are not greatly impressed by the argument in behalf of the appellant based upon the punctuation of the eleventh clause to the effect that because the phrase "to be divided equally among my said nieces and nephews share and share alike" is preceded by a comma instead of by a semicolon it, therefore, is

to be deemed to qualify only the gift to the children of George Turner and not all the gifts which precede it. "The natural sense in which words are used, as it appears from judicial inspection, always prevails over both punctuation and capitals, which are regarded as such uncertain aids in the interpretation of written instruments as to be resorted to only when all all other means fail." (*Kinkele v. Wilson*, 151 N. Y. 269, 277.) Here there is no such difficulty in getting at the testator's expressed meaning in the phraseology he adopted as to require resort to considerations of punctuation.

It does not seem to us that we should be justified in reversing and ordering a new hearing on account of the exclusion of the evidence mentioned in the appellant's offer to prove, which exclusion was the subject of exception. The facts embodied in the offer related to the extent of the testator's acquaintance and intimacy with Byron J. Tillman; and assuming them all to have been proven we do not see how they could change the result.

Upon the principal question argued, therefore, our conclusion is that the decree of the surrogate should be affirmed; but on the other hand we think it plain that it should be reversed so far as the respondent Blanche Turner is concerned.

The will was executed on February 28, 1910. Frank Turner, a son of George and the father of the respondent Blanche Turner, died April 28, 1908. Having thus died before the making of the will, Frank Turner could take nothing thereunder, and, therefore, nothing under the will passed to his daughter. (*Pimel v. Betjemann*, 183 N. Y. 194, 199.) In the case cited Chief Judge CULLEN says that "the clear weight of authority is in favor of the proposition that a bequest to a class does not include persons dead before the making of the will, who, had they survived till that time, would have fallen within the description given to the class, of course, in the absence of

something in the will or surrounding circumstances to show a different intent." It is argued that a different intent is manifested here by the direction at the end of the eleventh paragraph to the effect that the share of any dying with issue surviving shall be paid to such issue. This, we think, means dying *after* the making of the will.

The order appealed from and the decree of the surrogate should be modified so as to adjudge that the respondent Blanche Turner is not entitled to any part of the residuary estate as a devisee or legatee under the will of Charles E. Turner, deceased, and as thus modified, said order and decree should be affirmed, without costs to any party except the special guardian for Blanche Turner, whose costs must be paid out of the estate.

CULLEN, Ch. J., WERNER, HISCOCK and HOGAN, JJ., *concur*; CHASE and COLLIN, JJ., *concur* as to the claim of Blanche Turner, but hold that the appellant is entitled to *one-third* of testator's residuary estate.

Ordered accordingly.

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- (1.) **LETTERS ROGATORY TO THE GERMAN EMPIRE—CODE CIV. PRO. § 913.**

There being no provision of law in the German Empire for taking testimony by commission, letters rogatory may issue in a proper case under section 913 of the Code of Civil Procedure to the officials of said Empire, but without prejudice to any objections to the relevancy, materiality or competency of the proposed interrogatories, or the answers thereto, all such matters being reserved. *Matter of Smith*..... 51

- (2.) **SAME—BOOKS PRODUCED UNDER SUBPOENA DUCES TECUM—EXAMINATION BEFORE TRIAL—CONTEMPT.**

Books produced under a *subpoena duces tecum* on the examination of a defendant before trial are only required to refresh his memory so as to render the examination effective; and where he finds an entry of an item seemingly relevant to the inquiry he is within his rights in refusing on advice of counsel to translate it, though directed so to do by the court, where he states that the entry does not refresh his recollection; and an order adjudging him in contempt for such refusal will be reversed. *Shogry v. Naser* 232

See Practice, 16.

DESCENT AND DISTRIBUTION.

- BEQUEST OF LIFE INTEREST IN INCOME—BEQUEST OF PRINCIPAL TO LAWFUL ISSUE PER CAPITA AND NOT PER STIRPES.**

Where testator's daughter, to whom he had bequeathed a life interest in the income of a one-sixth part of the residue of his estate, with a bequest of the principal to her lawful issue at her decease, dies leaving her surviving three children and seven grandchildren said estate is to be distributed *per capita* and not *per stirpes*. *Matter of Cromwell*..... 356

EVIDENCE.

- (1.) **PROMISSORY NOTE—NOTICE OF PROTEST WHEN INSUFFICIENT IN LAW—CORPORATIONS—NEGOTIABLE INSTRUMENTS—ADMISSIBILITY OF.**

Where, on the hearing before a surrogate of a disputed claim on a promissory note indorsed by decedent, it appears that the notice of protest was mailed to her at the place of business of a corporation in which she was a director and stockholder, but no proof was offered that she actually received said notice, or that she was accustomed to receive her mail at that place, or that it was her place of business, the claim must be disallowed on the ground that the notice proved was insufficient in law to charge her as indorser. *Matter of Mandelbaum*..... 281

- (2.) **WAIVER.**

An executor may not waive notice of protest of a promissory note on which his testatrix is an indorser. *Id.*

- (3.) **SAME—WHEN DISALLOWED—CONFLICT OF—EXECUTORS AND ADMINISTRATORS.**

Where the claim of an executor against the estate is based on an alleged assignment of corporate stock, then under pledge to secure a loan to the decedent who died before the stock was to be delivered under the assignment, and one of the two subscribing witnesses thereto swears to its execution and delivery, and the other, who was not present either at the time the paper was signed or delivered, testifies that she signed it after the death of decedent at the request of the claimant; and because of irreconcilable conflict in the evidence no solution can be reached without the recognition of conscious untruth either in the prosecution or defense of the claim, it will be disallowed on the ground that the claimant upon the whole case has not established his right of recovery by clear and convincing testimony. *Matter of Peoples' Trust Co.* 165

- (4.) **SAME—PRESUMPTION—DEATH AFTER DISAPPEARANCE FOR SEVEN YEARS—DECEDENT'S ESTATE.**

Where an unmarried woman disappeared without a known cause, leaving her personal effects behind her, and nothing concerning her can be discovered after diligent search, she is presumed to be dead after the expiration of seven years from the date of her disappearance. *Matter of Benjamin*..... 509

(5.) ACCOUNTING—SURROGATE TO DETERMINE AS TO DEATH OF NEXT OF KIN.

The surrogate on the judicial settlement of the accounts of the administrator of an estate in which the person who so disappeared would have shared, should determine the fact of her death and order a distribution to the other next of kin. It is not necessary that such determination be made in a separate proceeding brought for that purpose. *Id.*

(6.) SAME—OF UNDUE INFLUENCE WHOLLY CIRCUMSTANTIAL—WILLS.

Where though the evidence is convincing that the only cause for testator's separation from his wife and children for the last ten years of his life was his devotion to the chief beneficiary under his will and codicil with whom during the same period he had maintained a meretricious intimacy and that she established an influence over him that barred his return to his marital and parental duty, but the evidence that such undue influence extended to the making of his testamentary acts is wholly circumstantial and contains no direct view of the beneficiary in the act of unduly influencing testator in making either his will or the codicil thereto, both instruments may be admitted to probate. *Matter of Coffin*.... 452

EXECUTORS AND ADMINISTRATORS.**(1.) APPOINTMENT OF RELATIVES OF THE WHOLE BLOOD TO BE PREFERRED TO THOSE OF THE HALF BLOOD—STATUTORY PRIORITY IN GRANT OF LETTERS OF ADMINISTRATION.**

The provision of section 2600 of the Code of Civil Procedure, that in the appointment of administrators relatives of the whole blood shall be preferred to those of the half blood, is broad enough to include cousins. *Matter of Tator*..... 403

A cousin of decedent, whose father and mother were respectively brother and sister to decedent's father and mother, has no statutory priority in the grant of letters of administration over another cousin where the relationship of both to decedent proceeds from the same ancestors, to-wit, grandparents. *Id.*

(2.) SAME—DIRECTIONS TO, UNDER WILL—ACCOUNTING—RETENTION BY, EXECUTOR OF CORPORATE STOCK—COSTS—PAYABLE BY EXECUTOR PERSONALLY. See Matter of Burdick..... 54**(3.) SAME—PROVISION IN WILL FOR PAYMENT OF LEGACIES—PROVISION THAT LEGACIES SHOULD BE BORNE RATABLY—TRUSTS.**

Where, after a bequest of the net income of a certain trust fund

directed to be invested at five per cent. per annum, to testator's daughter for life, and several general legacies, the will provided that in the event the estate should be insufficient to pay in full the legacies the trust fund provided for the daughter was to be paid in full, and that the reduction, if any, should be borne ratably by all the legacies, it being the testator's intention that the said trust fund should remain to the daughter unimpaired, the income therefrom constitutes a legacy to the daughter as one for support and maintenance payable as testator's death. Matter of Wolff. 65

(4.) SAME—LETTERS OF ADMINISTRATION WHEN GRANTED—STATUTE OF DISTRIBUTIONS.

Under section 2660 of the Code of Civil Procedure administration by relatives is to be granted only to such as are actually entitled to share in the distribution of the estate in the order in which such relatives are named.

Where a grandchild is the only person entitled to take under the Statute of Distributions all the estate of an intestate, letters of administration must be issued to him in preference to the intestate's half-brother. Matter of Patten..... 288

(5.) SAME—DEATH OF ITALIAN SUBJECT INTESTATE—RIGHT OF ITALIAN CONSUL TO LETTERS OF ADMINISTRATION.

Where a subject of the kingdom of Italy dies intestate in this state leaving him surviving no relative in this country entitled to succeed to his personal property, the Italian consul under treaty provisions has the prior right of administration upon the estate. Matter of Lombardi 1

(6.) SAME—LETTERS OF ADMINISTRATION TO BROTHER REVOKED—LETTERS OF ADMINISTRATION TO ITALIAN CONSUL UNDER TREATY WITH UNITED STATES CONTAINING "MOST FAVORED NATION" CLAUSE.

Where a subject of the kingdom of Italy dies intestate in this state leaving him surviving a brother, a resident of this state, and his father, a citizen and resident of Italy, letters of administration granted to the brother will be revoked and letters issued to the Italian consul under the Italian treaty with the United States, containing the "Most Favored Nation" clause. Matter of Madaloni 171

(7.) SAME—PRIOR RIGHT OF ITALIAN CONSUL TO ADMINISTER ESTATE OF DECEDENT—BOND MUST BE GIVEN BY CONSUL.

Where an Italian subject died in this state in 1912, leaving him surviving only his father and mother, both residents of Italy, the Italian consul under the provision of the treaty between the United

States and Italy has a prior right to administer the estate of decedent. *Matter of Ricardo*..... 101

There being no personal estate other than a claim for causing the wrongful death of decedent, the said consul must give a bond in the sum of \$500, there being a claim against the estate of \$206.40. *Id.*

(8.) SAME—SETTLEMENT OF ACCOUNTS OF—ALLOWANCE OF AMOUNT PAID COUNSEL FOR SERVICES IN PROCEEDINGS TO REVOKE LETTERS—ACCOUNTING.

On the judicial settlement of the accounts of an administratrix, she may be allowed from the estate the amount paid to counsel for services in resisting a proceeding to revoke her letters in which it was found that she was the lawful widow of intestate and to have been at all times rightfully in office as administratrix. *Matter of Higgins* 370

(9.) SAME—JUDICIAL SETTLEMENT OF ACCOUNTS OF—CODE CIV. PRO. § 829—SURCHARGING ACCOUNTS OF EXECUTORS—CLAIM FOR SERVICES DURING QUARANTINE OF WIDOW. See *Matter of Percival*.... 134

(10.) SAME—JUDICIAL SETTLEMENT OF—ACCOUNTING—ANNUITIES—WHO ENTITLED TO SHARE IN ESTATE.

Where by her will, which because of defective execution of waivers of citation was re-probated, testatrix, after giving from the principal of her estate an annuity and a legacy to different persons, bequeathed to her sister and another each one-half of the use and income of all her estate for life "upon the express condition that they pay each of the foregoing legacies," and after their death the rest of her estate was devised and bequeathed to her two brothers upon the same condition, and one of the executors under the supposed authority of the first probate paid the legacy, the annuity down to the time of the judicial settlement of his accounts, and until her death paid the bequest to testatrix's sister who appeared on the accounting by attorney and never appealed from the decree thereon, the contention of her executor, that because the residuary devisees and legatees did not personally pay the legacies, the residuary estate was left undivided and unbequeathed, and that the sister of the testatrix was entitled as an heir at law and next of kin to one-fourth of the estate which passed to her executor, will be overruled. *Matter of Wagman*..... 458

(11.) SAME—JUDICIAL SETTLEMENT OF ACCOUNTS OF—JURISDICTION OF SURROGATE—CODE CIV. PRO. § 2472a.

Where a will became effective because of the promise of the executrix and sole legatee, who was a sister of testatrix, that she would turn over to another sister a portion of the estate, the executrix, as such, is bound by the constructive trust raised by her promise which involved her duty and conduct in both relations, and upon the judicial settlement of her accounts the surrogate, under section 2472a of the Code of Civil Procedure, has jurisdiction in the premises. Matter of Delgado..... 159

(12.) SAME—COSTS AND EXPENSES OF ANNUAL ACCOUNTING—ANNUAL ACCOUNTING OF TRUSTEE.

The costs and expenses of an annual accounting by a testamentary trustee should be borne by the income unless they have been incurred in the administration, preservation or increase of the principal. Matter of Long Island Loan and Trust Co.... 64

(13.) SAME—WHEN NOT ENTITLED TO COMMISSIONS—WILLS—POWER OF SALE BY EXECUTORS.

Where it becomes unnecessary to exercise a power of sale by executors of their testator's real estate, the personal property being ample to pay all bequests and an annuity to testator's widow, and the residuary legatees and devisees give written notice of their election to take the realty free from any and all powers of sale given to said executors, they are not entitled to commissions on the unsold realty, in the absence of an actual sale. Matter of Duncan 463

(14.) SAME—GRANTING OF ALLOWANCE FOR COUNSEL FEES IN RESISTING REMOVAL FROM OFFICE—EXPENDITURE MADE IN DUE COURSE OF ADMINISTRATION.

An executor or trustee may be granted an allowance for counsel fees paid in resisting an effort to remove him from office only on the theory that the expenditure was made in due course of administration and for the benefit of the estate; that he was successful in avoiding removal is not of itself sufficient to justify the allowance. Matter of Titcomb..... 373

TRUSTEES—REMOVAL—ALLOWANCE TO.

Where a trustee made an investment in the bonds of an industrial corporation secured by the usual mortgage to a trustee, and during the trial of a proceeding to remove him, in which the facts as to such investment were shown and its unlawfulness asserted, the trustee sold the bonds without loss and reported that he had re-

ceived and held the proceeds in place of the bonds, the services of counsel in the proceeding were not rendered for the benefit of the estate and there can be no allowance to the trustee for counsel fees, nor for sums paid to a real estate expert whose services were primarily directed to the defense of the removal proceedings and in no way required for any general need of the estate. *Matter of Titcomb* 373

(15.) **SAME—COMMISSIONS AND EXPENSES OF—SUPPLEMENTARY PROCEEDINGS.**

Where the will of a testator, who died possessed of a bond of his brother, who was his residuary legatee, for \$3,000, secured by a second mortgage, contains general legacies to the amount of \$850, the account of the executor, who after charging himself with said mortgage and interest as so much money in his hands, must be settled according to his statement that he has a balance of \$3,811.12 subject to commissions and expenses of administration. *Matter of Collmar* 162

The claim of said brother's receiver in supplementary proceedings, that he is entitled to receive a part of the residuary legacy, and that the mortgage is a subsisting claim against the residuary legatee and should be enforced for the benefit of the receiver, requires no attention upon the face of the executor's account. *Id.*

(16.) **SAME—REVOCATION OF LETTERS OF ADMINISTRATION—OBTAINED BY FALSE SUGGESTION—MARRIAGE—REMARRIAGE OF ONE HAVING A HUSBAND LIVING—VOID AB INITIO.**

Letters of administration obtained by a false suggestion must be revoked. *Matter of Kutter*..... 48

At common law, the remarriage of one having a husband or wife actually living, though unheard of for years and believed to be dead, was void *ab initio*. *Id.*

Where a wife, not having heard from her husband for over seven years, was married to decedent in the state of New Jersey, letters of administration issued to her as his widow will be revoked on the presumption that in the absence of proof the common law prevails in the state of New Jersey. *Id.*

(17.) **SAME—SURCHARGING ACCOUNTS OF—WILLS—ESTOPPEL.**

Where certain real estate was devised to testator's children in equal shares subject to the life estate of their mother, and the executors acting under a naked power given by the will sold a

farm to one of testator's children for \$5,000, and it appears that one of the residuary devisees, seeking to surcharge the accounts of the executors with a loss upon allegations that they were negligent in selling the farm for less than its fair market value without proper effort to obtain such value, had stated that if all the rest were willing to sell for \$5,000 she would take the same, and the executors act thereon, she is estopped from questioning their acts in relation thereto. *Matter of Weed*..... 447

- (18.) SAME—SECTIONS 2685, 2686 AND 2687 OF THE CODE OF CIVIL PROCEDURE CONSTRUED—WHEN REMOVAL OF EXECUTOR OR TRUSTEE NOT DISCRETIONARY WITH SURROGATE—DUTY OF SURROGATE TO MAKE FINDINGS. See *Matter of Engel*..... 500

See Accounting. Decedent's Estate.

INDIANS.

TONAWANDA RESERVATION—STATE LAWS SUPERIOR TO INDIAN CUSTOMS—POWER OF THE SURROGATE'S COURT TO GRANT LETTERS OF ADMINISTRATION—CONVEYANCE OF INDIAN LANDS BY DEED—DISTRIBUTION OF PROPERTY AT INDIAN TENTH DAY OR DEAD FEAST—PEACE-MAKERS' COURT—JURISDICTION—PROHIBITION AGAINST DETERMINATION OF LAND TITLE—TRIBAL CUSTOM AS TO INHERITANCE—CHILD BORN OF MOTHER BELONGING TO ANOTHER TRIBE. See *Hatch v. Luckman* 519
Matter of Brown..... 201

HUSBAND AND WIFE.

HUSBAND AND WIFE—MARRIAGE BY RELIGIOUS CEREMONY—LEGITIMACY OF CHILDREN—EXECUTORS AND ADMINISTRATORS. See *Matter of Grande* 257

GUARDIAN.

GENERAL—INFANTS—ACCOUNTING BY GUARDIAN.

Where money belonging to an infant was applied by his general guardian to her personal use, her estate is chargeable with the amount so applied, less the expense of her appointment.

Where, by her son's will, such guardian was bequeathed all his interest in certain real estate on condition that she should take care of his son until he became of age, it was the guardian's duty, having qualified as executrix, to care for and maintain her infant

grandson, and a charge for his board and maintenance cannot be allowed on her accounting for his money which she had illegally expended for her own use. *Matter of Klein*..... 242

GUARDIAN AND WARD.

APPLICATION BY FATHER OF INFANTS FOR ANNUAL ALLOWANCE FOR SUPPORT AND MAINTENANCE—ALLEGATION IN PETITION THAT PETITIONER IS UNABLE TO MAINTAIN INFANTS—APPLICATION BY GUARDIAN FOR REIMBURSEMENT FOR PAST MAINTENANCE.

Upon an application by the father of two infants, as guardian, for an annual allowance for their support and maintenance, the court must take into consideration the circumstances of the father, and his petition must allege that he is unable to maintain said children. *Matter of Brown*..... 20

Upon such an application the court must also take into consideration the amount of the infants' fortune, and where it appears that the yearly income therefrom is \$24,000 and that the infants are two girls aged, respectively, three and eight years, an order will be granted requiring the trustee to apply \$5,000 for the maintenance of each, and the guardian's application for reimbursement for past maintenance will be denied. *Id.*

JURISDICTION.

(1.) JURISDICTION—TO HEAR AND DETERMINE A CLAIM FOR WORK DONE.

A surrogate has no jurisdiction to hear and determine a claim for work done, on the order of an executor, after the death of the testatrix. *Matter of Hyatt*..... 273

(2.) SAME—SALE OF DECEDENT'S LANDS FOR PAYMENT OF DEBTS—NO JURISDICTION TO SET ASIDE SALE AND DIRECT A RESALE.

Where a decedent's lands have been sold for the payment of debts, and the administratrix has received earnest money from the purchaser, the surrogate is without jurisdiction to set aside the sale, direct a resale and a return of the earnest money. *Matter of Brown* 196

LEGACY.

(1.) SPECIFIC OR DEMONSTRATIVE—DELIVERY TO SAVINGS BANK OF CERTIFICATE OF DEPOSIT—EXECUTORS AND ADMINISTRATORS.

Where an executrix the day before the death of her testatrix delivered to a savings bank a certificate of deposit for \$1,000, in-

dorsed by decedent and payable to her order on its return properly indorsed to a national bank from which she received it, and the savings bank, within a week after her death, upon being informed by the indorsee that the certificate had been paid, opened an account in the name of the decedent, in trust, for her executrix, naming her a legacy of \$500 payable exclusively out of any funds testator might have on deposit is payable by the executrix whether said legacy be called specific or demonstrative. Matter of Marine. 21

(2.) TO PASTOR OF CHURCH FOR SAYING MASSES—TO WHOM PAYABLE—
LAPSED LEGACY—DECEDENT ESTATE LAW, § 29.

A legacy to the pastor of a certain church, for the purpose of saying masses for the souls of testatrix and her deceased husband, is payable to the person who at the death of testatrix is the pastor of said church. Matter of Rywolt..... 425

A legacy to a decedent who predeceased the testatrix lapses and is distributable under the residuary clause of the will, and where a child of said legatee also predeceased testatrix without leaving issue section 29 of the Decedent Estate Law as amended by chapter 384 of the Laws of 1912 does not apply. Id.

NOTES.

NOTE ON THE EFFECT OF CANCELLATION, LOSS OR DESTRUCTION OF ONE OF DUPLICATE OR TRIPPLICATE WILLS 37

NOTE ON SIGNATURE AT END OF WILL..... 422

NOTE ON REVOCATION OF WILL BY SUBSEQUENT BIRTH OF ISSUE 38

PRACTICE.

(1.) MOTION TO CONSOLIDATE SEPARATE, CONTESTED PROBATE PROCEEDINGS—
—MOTION AT CHAMBERS FOR AN ORDER REGULATING THE PROCEDURE
ON THE TRIAL OF A CONTESTED PROBATE PROCEEDING.

A motion to consolidate separate, contested proceedings for the probate of instruments in writing purporting to be last wills and testaments is a part of the trial of a contested probate proceeding;

and in the county of New York such a motion must be made before the surrogate assigned to preside at the "trial term."

A motion made at chambers for an order regulating the procedure and order of proof on the trial of a contested probate proceeding will be denied as premature. *Matter of Martin*..... 213

(2.) **DEPOSITION—SETTLEMENT OF INTERROGATORIES ANNEXED TO LETTERS ROGATORY TO TAKE TESTIMONY—CODE CIV. PRO., § 913.**

While a surrogate upon the settlement of interrogatories to be annexed to letters rogatory to take testimony pursuant to section 913 of the Code of Civil Procedure must pass upon the pertinency of the interrogatories, all other objections must be reserved until the trial when the deposition is offered in evidence. *Matter of Smith* 339

See Deposition.

PROBATE.

(1.) **WITNESSES—CODICIL EXECUTED IN SISTER STATE IN ACCORDANCE WITH LAWS THEREOF.**

Where a resident of this state while in the state of Florida executes a paper purporting to be a codicil to her last will, and the law of that state provides that all wills of personal property shall be in writing and signed by the testatrix or some other person in her presence and by her express direction, said codicil, so far as it affects personal property, is entitled to probate in this state, though not attested by any subscribing witnesses. *Matter of Anderson* 27

(2.) **CONTEST BY HEIR AT LAW—VALIDITY OF AGREEMENT BY LEGATEE AND PROPONENT OF WILL TO ACCEPT LESS THAN AMOUNT GIVEN HIM BY THE WILL IN CONSIDERATION THAT CONTEST OF PROBATE BE STOPPED AND THAT ESTATE BE SETTLED IN A CERTAIN COUNTY—QUESTIONS OF FACT FOR THE JURY. See *Schoonmaker v. Gray*..... 548**

(3.) **WHEN PROBATE GRANTED—EXECUTION OF, FOUR MONTHS PREVIOUS TO COMMITMENT TO STATE HOSPITAL FOR INSANE.**

Where it appears that testatrix had delusions and that she had been taken to a private institution for the insane the day after she executed her will, that she had been legally adjudged insane and legally committed to a state hospital for the insane about four months after the execution of the will and died hopelessly insane

thirteen years thereafter, and it also appears that she was rational on many occasions while she was in said hospital and that she was rational when she executed the will, probate will be granted. Matter of Browning 380

(4.) CITATION FOR PROBATE—SUBSCRIBING WITNESSES—LEGACY—APPLICATION TO SET ASIDE PROBATE—CODE CIV. PRO. § 2481 (6).

Where upon the return of a citation for probate regularly issued the only heir and next of kin, testator's infant grandchild, appeared by her general guardian and, after the appointment of a special guardian and an adjournment, the testimony of the subscribing witnesses and also that of one of the executors named had been taken, and on an application made under section 2481 (6) of the Code of Civil Procedure to open and set aside the decree of probate on the sole ground that the testimony of the executor was incompetent as he was a legatee, there is no evidence that the infant was wronged, but, on the contrary, that the decree for probate was entered after an agreement had been made whereby the infant's legacy was materially increased, and an accounting was had that was regularly passed upon, and the infant, on coming of age, and in court and under the supervision of her special guardian who had recommended that the will be admitted to probate, executed a release and received her legacy as agreed upon, the petition to set aside the decree will be denied, though it appears that neither of the subscribing witnesses was examined as to the mental capacity of testator and that the defect in proof was supplied by the executor who testified without objection. Matter of Wickwire..... 224

TAXES.

(1.) TRANSFER TAX—EXECUTORS AND ADMINISTRATORS—RATE OF TAXATION TO BE DETERMINED AS STATUTE PROVIDES.

Where an appraiser is fixing the amount of the transfer tax has only deducted the amount actually expended in the administration of assets in another state, his decree will be modified by also deducting the expense of such administration as estimated by the surrogate for future services on the judicial settlement of the accounts of the executrix. Matter of Granfield.

Where testator gave to his daughter for life one-half of his residuary estate with full power to dispose of the same, and at her death her share, or so much thereof as should then remain, was given to her surviving issue, if any, in equal shares, and, in the event that she left no issue, said estate was given to testator's brother and sisters in equal shares, the remainder interest is not subject to a transfer tax until the death of testator's daughter, the

rate of taxation to be determined as the statute provided at the time of testator's death. *Id.*

- (2.) **SAME—BENEFICIARY OF A TRUST FUND—WILLS—ESTATES IN REMAINDER WHEN TAXABLE—LIFE ESTATES SUBJECT TO TRANSFER TAX.** See *Matter of Smith*..... 227

- (3.) **SAME—ANNUITIES—WILL OF FOREIGN SUBJECT—EXECUTORS AND ADMINISTRATORS.**

Where an annuity, given by the will of a British subject to an Austrian subject, though payable from assets in the United States of America, is subject to a legacy tax in England, the remittance by the American representative of the estate to the English executors of the amount of such tax, and the deducting of the same from the property set apart by the executors in America for the production of such annuity, are justified, and an objection to such payment will be overruled. *Matter of Hollins*..... 91

- (4.) **SAME—ON INSURANCE POLICY—DISCRETIONARY POWER TO SELL REAL ESTATE—NO DEDUCTION FOR EXPENSES.**

A policy of insurance on the life of a testator, in terms payable to his executors, administrators or assigns, for the express benefit of testator's wife and surviving children, is not subject to a transfer tax. *Matter of Elting*..... 4

On an appraisal for the purpose of fixing a transfer tax no deduction can be allowed for the necessary expenses of converting into cash testator's real estate, as to which the executors had merely a discretionary power of sale. *Id.*

- (5.) **SAME—EXEMPTION FROM—REMAINDER AFTER LIFE ESTATE CONSTRUED AS VESTED.**

A bequest of a residuary estate to the legal heirs of testator, at the death of the life tenant, is a vested remainder, and where the interest of one of said legal heirs, a brother of testator, is appraised at less than \$5,000, it is exempt from a transfer tax, as is also the interest of the nephews and a niece of testator, the other legal heirs, the share of each being less than \$1,000. *Matter of Eaton*.... 42

- (6.) **SAME—PROVISION FOR IMPOSITION OF TAX UPON THE RIGHT TO SUCCEED TO PROPERTY AND NOT UPON THE PROPERTY ITSELF—TAX LAW, § 220 (7).**

Sections 220-245 of the Tax Law provide for the imposition of a tax upon the right to succeed to property and not upon the property itself.

Under the provisions of section 220(7) of the Tax Law, that a transfer tax shall be imposed upon the clear market value of

property transferred by will or the intestate laws, the "clear market value" of the property of a decedent must be ascertained as of the date of his death, when the transfer takes effect; without any deduction of inheritance taxes imposed by other states upon the succession to shares of stock of corporations organized therein. *Matter of Penfold*..... 485

(7.) SAME—"LINEAL DESCENDANTS"—ILLEGITIMATE CHILDREN.

The children of a decedent's illegitimate daughter, though born in lawful wedlock, are not his "lineal descendants," and legacies to said children are taxable at the rate of five per cent. *Matter of Roebuck* 158

(8.) SAME—GIFT TO UNCERTAIN NUMBER ASCERTAINABLE IN FUTURE ONLY TAXABLE AS SINGLE LEGACY.

Where a testator's residuary estate was devised and bequeathed in trust for a body of persons uncertain as to number and ascertainable only at a future time upon the death or remarriage of testator's widow, and the value of the definite portion each of said persons is to take is determinable only upon the number of the survivors at the time of the division of the trust fund, it is subject to a transfer tax as one legacy. *Matter of Hogg*..... 16

(9.) SAME—CONVEYANCE OF REAL ESTATE BY HUSBAND AND WIFE—PURCHASE MONEY MORTGAGE.

Where, upon the conveyance of real estate by husband and wife as tenants by the entirety, a purchase money mortgage was taken in their joint names, and a cash payment made to them by a check payable to them jointly was deposited in a trust company in the wife's name solely for the purpose of being reinvested in real estate in the same manner as that which had been conveyed as testified to by the surviving husband, he, upon the wife's death, became entitled to the sole possession of one-half of the mortgage, and one-half of the amount of the check, and the remaining one-half of said two funds passed into the wife's estate and was subject to a transfer tax. *Matter of Thompson* 405

(10.) SAME—WHAT ESTATE IS SUBJECT TO TRANSFER TAX—SAVINGS BANK ACCOUNTS—TAX LAW, § 220 (4).

Upon the death of a testator who died in October, 1911, one-half of the balance due on joint deposits in bank in the name of himself and wife became transferrable as a gift to the wife intended to take effect in possession or enjoyment at or before his death and is subject to a transfer tax under section 220 (4) of the Tax Law, as amended by Laws of 1911, chapter 732.

Where, three years before testator's death, the heading of his savings bank account was changed by the addition of words which enabled his wife to draw the money, the full amount in said bank at his death is also subject to a transfer tax. *Matter of Durfee*.. 173

(11.) **SAME—WILLS—EXEMPTION FROM PAYMENT OF TRANSFER TAX—LAWS 1912, CH. 206.**

A bequest to the American Society for the Prevention of Cruelty to Animals, under the will of a decedent who died in 1911, is subject to a transfer tax. *Matter of Daly*..... 155

(12.) **SAME—WILLS—VALUE OF WIDOW'S DOWER.**

Where, after a devise of certain real estate to a stranger to the blood, testator devised and bequeathed to his wife all the rest, residue and remainder of his property, both real and personal, in fee simple absolute forever, and with no express declaration that such provision was to be in lieu of dower, on the appraisal of the estate for the purposes of a transfer tax the value of the widow's dower in all the real estate of which testator died seized should be fixed and deducted. *Matter of Church*..... 254

(13.) **SAME—TAX LAW, § 221—PROVISION OF TAX LAW AS TO TRUSTEES—CORPORATIONS.**

A bequest to individuals in trust for charitable purposes is subject to a tax under section 221 of the Tax Law, notwithstanding the will provides that the trustees, if they deem it advisable, may cause a corporation to be created for the purpose of executing a trust, no corporation having been formed at the time of the application to assess the tax. *Matter of Robinson*..... 265

(14.) **SAME—ON ALLEGED TRANSFER OF A ONE-HALF INTEREST IN FIVE CERTAIN MORTGAGES—EVIDENCE. See *Matter of Piton*..... 116**

TRUSTEES.

(1.) **TRUSTEES—TESTAMENTARY—APPOINTMENT OF A SUCCESSOR TESTAMENTARY TRUSTEE—CODE CIV. PRO., § 2818—WILLS.**

Where all but one of four trustees die to whom, and the survivors of them, testator devised his estate in trust, an application for the appointment of a successor testamentary trustee, under section 2818 of the Code of Civil Procedure, must show that it is for the benefit of the *cestui que trustent* so to do. *Matter of Zerega*. 434

Where the answers to the petition completely negative, or explain, all the material facts tending to show a benefit to the *cestuis que trustent* by the appointment of a successor trustee, the benefit to the

trust is doubtful, and the application being contrary to the express terms of the will must be regarded with disfavor and denied. *Id.*

- (2.) TRUSTS—DIRECTION TO TRUSTEES TO PAY INCOME TO RESPECTIVE BENEFICIARIES—CONTRACT BETWEEN TESTATOR'S WIDOW AND SON TO PREVENT THE CONVERSION OF RESIDUARY ESTATE INTO MONEY—CODE CIV. PRO., § 2472a—JURISDICTION TO CONSTRUE—ASSIGNMENT AND AGREEMENT—TURNING OVER TO A HOLDING CORPORATION OF SECURITIES CONSTITUTING TRUST FUND. See *Matter of Higgins* 467

- (3.) TRUSTEES—ACCOUNTING BY—ALLOWANCE OF COMMISSIONS—PAYMENTS.

An accounting trustee may not be allowed commissions on income paid out if there is no income on hand.

Where there is nothing in the account to support the suggestion, an amount put into an investment along with principal may not be considered as unapplied income.

That the trustee has not paid over a dividend stock to the beneficiary entitled to all income is a sufficient basis for regarding said stock as principal. *Matter of Weil*..... 280

- (4.) TRUSTS—WHAT ESTATE CREATED FOR A PERIOD MEASURED BY TWO LIVES—REAL PROPERTY LAW, § 66—ESTATE BY MARRIAGE—VESTING OF LANDS IN RESIDUARY DEVISEES WITH POWER OF SALE—WILLS. *Matter of Bleckwehl* 275

TRUSTS—ACTION TO SET ASIDE TRANSFERS OF REAL ESTATE. See *Eysaman v. Nelson*..... 294

ACCOUNTING—IN SUPREME COURT—TRUSTEES—EXECUTORS AND ADMINISTRATORS—COMMISSIONS AND COMPENSATION ALLOWED ON. See *Eysaman v. Nelson*..... 294

FRAUD—ACTIONS FOR—SETTING ASIDE DECREE OF SUPREME COURT—ACCOUNTING BY TRUSTEES. See *Eysaman v. Nelson*..... 294

WILLS.

- (1.) HOLOGRAPHIC—CONSTRUCTION OF BEQUESTS UNDER.

A bequest, by a holographic will, to A or his child, of a specified interest in certain real estate, is effectual as a gift to A or his child or children, in case A dies before the testatrix. *Matter of Lane* 45

- (2.) Where such testatrix devised certain real estate to B in trust For B's children, with directions that B should have the income for life, the gift is to B with remainder to her children. *Id.*

- (3.) A bequest of the deed of certain real estate is no more than a gift of said instrument, and a pecuniary legacy given by the same clause of the will is primarily payable from the personal estate. *Id.*

- (4.) EXECUTED WITH LEAD PENCIL—STRIKING OUT CERTAIN TESTAMENTARY PROVISIONS—REVOCATION OF—DECEDENT ESTATE LAW, § 34.

Where a testator, after having duly executed his last will, struck out some of the testamentary provisions, added clauses and changed the amounts of many legacies, but the original words are plainly discernible beneath the pencil marks, the testator's signature is undefaced and material parts of the instrument as originally executed remain unchanged and uncanceled, such acts of testator will not be deemed to have been done *animo revocandi*. *Matter of Crawford* 377

Such acts even if made with intention to revoke the will would be inoperative, as under section 34 of the Decedent Estate Law a will cannot be revoked, either in part or in whole, by a cancellation of a part of the instrument. *Id.*

- (5.) RESIDUARY CLAUSE—TRUSTS—DISTRIBUTION OF TRUST FUNDS.

Where by a will containing no residuary clause the executors were given certain personal assets in trust to invest and pay the income to testator's sister during her life, with direction that at her death the estate was to be divided into as many equal shares as the sister left children, and that each be paid his share on reaching the age of twenty-one years, upon the death of the sister leaving no children her surviving there arises an intestacy as to the principal of the trust, distribution of which must be decreed accordingly. *Matter of Sandhusen*..... 248

- (6.) SUBSCRIPTION THEREOF BY TESTATOR AND WITNESSES ON FIRST PAGE—SUBSCRIPTION BY TESTATOR ALONE ON THIRD PAGE—SUBSCRIPTION INSUFFICIENT—DECEDENT ESTATE LAW, § 21 (4).

Where a will drawn on a blank, consisting of one sheet of paper folded so as to make four pages, was signed by the testator and the subscribing witnesses on the first page, and by the testator alone on the third page, it is not signed at the "end of the will" as provided by section 21(4) of the Decedent Estate Law, and probate of the instrument will be refused. *Matter of Reissner*..... 420

- (7.) SIGNATURE OF TESTATOR AT END.

Where a single paper, consisting of two sheets of legal cap woven together in the web and folded so as to make four pages, was used

in drafting a will, and the writing was commenced on the first page, continued consecutively on the fourth page and concluded on the second page with the signature of the testator, and there is no writing or signature on the third page, the instrument is signed at the end thereof within the meaning of the Statute of Wills and is entitled to probate. *Matter of Peiser*..... 188

(8.) EXECUTION OF, UNDER MISTAKE AS TO LEGAL EFFECT OF CERTAIN TRUST DEEDS—PROBATE OF.

Where parts of a will were duly executed under a mistake as to the legal effect of certain trust deeds executed by testatrix to which reference was made in the will, the instrument cannot be refused probate. *Matter of Swartz*..... 121

(9.) CONSTRUCTION—INTENT OF TESTATOR—PLAIN IMPORT—VOID REMAINDER.

Where the meaning of a will is apparent from its language, the plain import cannot be departed from to save the instrument from condemnation. *Matter of Raab*.

Where a testator's intention is clear from the face of his will no resort to extraneous circumstances is permissible in aid of the construction of the instrument. *Id.*

Where a remainder contingent upon an uncertain event is limited on an invalid trust term, it is void from its creation. *Id.*

A residuary bequest and devise to trustees to collect rents, issues and profits, to apply the same to the costs of the maintenance of the trust estate and to accumulate the surplus during the minority of four grandchildren of testator, with equitable cross remainders in the trust fund, in the event that any grandchild dies before reaching majority, with legal remainders over to charity in the event that all the grandchildren die before arriving at full age, violates the statute as to perpetuities and is, therefore, void. *Id.*

(10.) SAME—DEVOLUTION OF INTEREST—DIRECTION FOR SALE OF REAL AND PERSONAL PROPERTY.

Where a will in one paragraph directs the sale of certain real and personal property and an equal division of the proceeds of such sale among testator's children and certain of his grandchildren, and, in the next paragraph, a daughter of testator is given all his right, title and benefit in a fraternal organization, and all the beneficiaries survive testator, the gifts under the first paragraph vest at the death of testator and the interest of a grandchild upon her death passes to her legal representatives and not to her next of kin; and a decree judicially settling the account of testator's executor cannot be entered unless such legal representatives are brought into the proceeding. *Matter of Jagel*..... 72

- (11.) **SAME—DEVISE OF FARM IN EQUAL SHARES TO TWO DAUGHTERS—CHARGE ON FARM OF LEGACY—DEVISE IN TRUST, WITH REMAINDER OVER.**

While the courts may not rewrite wills they must correct inaccurate expressions and give effect to the evident intent of testators.

Brookman v. Tuthill..... 359

- (12.) **IN THE CONSTRUCTION OF DOUBTFUL PROVISIONS OF A WILL THE WORDS USED MUST BE TAKEN IN THEIR NATURAL SENSE—MEANING AND APPLICATION OF WORD "EACH" IN CLAUSE DISTRIBUTING RESIDUARY ESTATE AMONG NEPHEWS AND NIECES OF TESTATOR.**
Matter of Turner 571

- (13.) **INTENT OF TESTATOR—ADEMPTION—ADVANCEMENTS—LIFE ESTATES.**

Where, upon a conveyance of certain premises to his favorite daughter, the grantor took back a mortgage for the entire purchase price which was never recorded but delivered to and found among his affects after his death, and upon the judicial settlement of the accounts of said daughter as his executrix it satisfactorily appears that while her husband, as he testified, pursuant to an agreement with the testator, assigned certain corporate stock to said daughter, testator never carried out on his part said agreement by satisfying said mortgage or by delivery thereof to his daughter, the husband's parting with stock, independent of the marital relation, was a good consideration for the promise of testator to give the mortgage to said daughter and she as his executrix was not chargeable therewith. Matter of Percival..... 134

- (14.) **SAME—USE IN WILL OF MISNOMER.**

Where it appears by extrinsic evidence that a bequest of \$1,000 was intended for the "Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children," an incorporated society, and the use in the will of the name "St. Joseph's Union," an unincorporated branch of said mission was a misnomer, the testamentary intention will be effectuated by payment of the money to the mission. Matter of Sliney..... 450

- (15.) **SAME—INTENT OF TESTATOR—DISTRIBUTION PER STIRPES OR PER CAPITA TO BE ASCERTAINED FROM THE LANGUAGE THEREOF—LEGACY—WHEN PAYABLE—EXEMPTION UNDER TRANSFER TAX LAW.** See Matter of Title Guar. & T. Co..... 428

The intent of a testator as to whether his estate is to be distributed among his grandchildren *per stirpes* or *per capita* must be ascertained from the language of all the provisions of his will.

Where a legacy is presently payable to one who is also a contingent remainderman, the exemption to which under the Transfer Tax Law he is entitled as legatee is not to be deducted *in toto* from the legacy, but only in the proportion which the entire value of his interest in the estate bears to the value of the legacy. *Matter of Title Guar. and Trust Co.*..... 428

(16.) WILL—LIFE ESTATE—BURIAL EXPENSES OF.

Where a husband dies, knowingly leaving an indigent widow, and a will by the provisions of which he gives her a life estate in all his property with provision that "if at any time the income of same is insufficient for her support, then she is to have as much of the principal, each year, as is necessary for her maintenance, including the income, as aforesaid," he intended that her reasonable burial expenses should be paid from his estate, and the administrator will be allowed the amount thereof. *Id.*

(17.) EXECUTION—ACKNOWLEDGMENT OF SIGNATURE.

Where a will has not been signed by the testator in the presence of either witness he must, with his signature to the will visible, acknowledge the same to each of the witnesses. An acknowledgment to one of the witnesses is insufficient.

Hence, where a testator drew his own will on an ordinary printed form, signed the same at the end thereof, and also wrote his name in the attestation clause merely for the purpose of identification, an acknowledgment of his signature to one of the witnesses with the will so folded that his signature at the end thereof was not visible, the witness seeing only his signature in the attestation clause, is insufficient and probate will be refused although his signature was properly acknowledged to the other witness. *Matter of Keefe*..... 543

(18.) EXECUTION IN TRIPPLICATE—TWO LOST—DECLARATIONS OF TESTATRIX—PROBATE.

Where a will was executed in triplicate in 1883, the presumption, that the one traced to the possession of the testatrix but which could not be found after her death was destroyed with intention to revoke, is overcome by proof of her declaration, made a few days before her death on the opening of a safe in which were found a will made by her in 1874 and another made by a deceased sister, that the wills were at Williams College. *Matter of Patteson*.. 12

Where the testatrix had no immediate relatives or friends with whom intimacy of any kind existed, and the provisions of her will

seem entirely natural, and it appears that one of the triplicate wills was left with testator's attorney who sent one to the then president of Williams College and the third one was taken away by testatrix at the time of the execution of her will, and its whereabouts not known, and the absence of the one left with her attorney is satisfactorily accounted for, the one produced by Williams College and shown to have been in the possession of its treasurer at the time of the death of testatrix will be admitted to probate. *Id.*

- (19.) APPOINTMENT OF TRUSTEE TO MANAGE AND CONTROL THE ESTATE—
PASSING OF REMAINDER. See *Eysman v. Nelson*..... 294

- (20.) DECLARATION OF TRUST—REAL PROPERTY LAW, § 242—PLEADING
FORMER DECREE.
Where the will of testatrix recited that whereas it was the intention of her deceased husband, by whose will she inherited all her estate, that upon her decease the "residue and remainder" of his estate should go to his children, and that she so desired it, there is no declaration of trust of the property received by her from him, within the meaning of section 242 of the Real Property Law, as the will failed to show that she took the property under any promise express or implied to carry out his intention, but that in giving it to the children she was carrying out his wishes. *Gabriel v. Gabriel* 391

- (21.) CREATION OF TRUST—PAYMENT OF PRINCIPAL TO ISSUE DOES NOT
DELAY VESTING BUT IS ONLY A POSTPONEMENT OF TIME OF PAY-
MENT—RESIDUARY ESTATE—SUSPENSION OF POWER OF ALIENATION.
See *Faber v. Hauck*..... 351

- (22.) LEGACY OF AMOUNT DUE ON BOND AND MORTGAGE IS SPECIFIC—
EXECUTOR AS LEGATEE IN TRUST UNDER RESIDUARY CLAUSE. See
Matter of Bouk..... 234

- (23.) BEQUEST OF CERTAIN WEEKLY SUM TO HUSBAND FOR LIFE—POWER
OF SALE—EXECUTORS AND ADMINISTRATORS—WHAT INTEREST
PASSES BY WILL. See *Matter of Fritsch*..... 250

- (24.) SUCCESSIVE LIFE ESTATES WITH REMAINDER TO CLASS—SUSPENSION
OF POWER OF ALIENATION—PARTIAL INVALIDITY OF WILL—ACTION BY
REMAINDERMAN FOR PARTITION. See *Wells v. Rowland*..... 512

- (25.) DEVOLUTION OF RESIDUARY ESTATE—APPLICATION OF WORDS "LEGAL REPRESENTATIVES"—DIVISION OF RESIDUARY TRUST FUND PER STIRPES AND NOT PER CAPITA. See *Dwight v. Gibb*..... 564

- (26.) BEQUEST OR DEVISE TO TESTATOR'S DAUGHTER, WHEN EFFECTIVE—ADOPTION OF ILLEGITIMATE CHILD OF WHICH TESTATOR WAS THE FATHER—CONDITION SUBSEQUENT.

A condition, that a bequest or devise to testator's daughter shall not be effective unless within six months of testator's death her legal adoption of an illegitimate child of which testator was the father shall be annulled, is a void condition subsequent and the daughter takes without condition. *Matter of Anonymous*.... 207

- (27.) BEQUEST IN CASH AND AMOUNT DUE TO TESTATOR ON A CERTAIN MORTGAGE—DISCHARGE OF LEGACIES GIVEN BY, IN EVENT THAT ABATEMENT SHOULD BECOME NECESSARY.

A bequest of \$1,000 in cash and \$1,000 due to testator on a certain mortgage is, standing alone, a general legacy of \$2,000 payable from the demonstrated source if available, otherwise from the general estate, though by a subsequent clause of the will said mortgage is made applicable to the discharge of each of many legacies given by the will in the event that abatement should become necessary. *Matter of Marshal*..... 198

- (28.) TRUSTS—FOR SEVERAL BENEFICIARIES—CONSTRUCTION OF TRUST—REMAINDER OF TRUSTS FUND TO WHOM PAID—EXECUTORS AND ADMINISTRATORS.

Where a trust for several beneficiaries successively provides that in the event of the death of the one last named the remainder of the trust fund shall be paid to the husband and children of testator's sister, in such sums from time to time as in the judgment of the executors may seem best, and all the beneficiaries die before testator, except certain of his sister's children, the trust as to them is accelerated and is to be construed merely as a direction that the trust fund must be paid to them immediately. *Id.*

- (29.) DEVISE OF RESIDUARY ESTATE WITH REMAINDER OVER—VESTED REMAINDER—DEATH OF REMAINDERMEN BEFORE LIFE TENANT LEAVING ISSUE.

Where a will creates a trust to pay the net income of testator's residuary estate to his wife during life, and upon her death to pay over, divide and distribute said estate to and among four sons in equal shares, and provides that, should any one or more of them die without leaving lawful issue before such distribution, then the

share or shares of him or them so dying should be equally divided among all testator's grandchildren then living share and share alike, and in case of the death of any one or more of said grandchildren dying leaving lawful issue such issue should receive the share his, her or their parent would have taken if living *per stirpes* and not *per capita*, to be paid to said grandchildren or their issue on attaining majority, each son takes a present estate subject only to be defeated on his death without issue, and such of said sons who had died since their father and before their mother leaving issue took and left a vested estate in the trust fund which in each instance escapes the further control of testator's will and as a part of the general estate of said sons, respectively, is governed by the Statute of Descent and Distribution. *Matter of Godwin*..... 30

(30.) BEQUEST TO CHARITY—CHARITABLE PURPOSE UPHELD—EXECUTORS AND ADMINISTRATORS.

The principle is now firmly established that if a charitable purpose pervades and dominates a bequest the scheme and purpose of the testator should be upheld in the courts.

A bequest to the cause of charity, to be expended by the executor at such times and in such amounts as he may "elect to disperse; to worthy individual cases and to various institutions dedicated to the cause and alleviation of human physical suffering," calling the earnest attention of the executor to the dire necessity of inadequately endowed hospitals and institutions of like character, but earnestly and heartily disapproving of his rendering any financial assistance to institutions engaged in the practice of establishing and maintaining foreign missions, is valid. *Day v. Day*..... 363

(31.) CORPUS OF ESTATE AFTER DEATH OF LIFE TENANT GIVEN TO TESTATOR'S CHILDREN—GIFT TO ISSUE AFTER LIFE ESTATE.

Where the corpus of an estate after the death of a life tenant was given to testator's children in equal shares, the will stating the issue of any deceased child or children to represent the share which the parent would have been entitled to receive, a grandchild of testator, whose father died before the life tenant, is entitled to receive the entire share to which her father would have been entitled. *Matter of U. S. Trust Co.*..... 24

(32.) DIVISION OF REST, RESIDUE AND REMAINDER INTO CERTAIN PARTS—ACTION FOR CONSTRUCTION OF RESIDUARY CLAUSE AS TO DIVISION. See *Matter of Ingersoll*..... 347

- (33.) RESIDUARY ESTATE TO EXECUTORS AND ADMINISTRATORS, IN TRUST, TO SELL AND DISPOSE OF SAME AND TO DIVIDE THE PROCEEDS—DUTY OF TRUSTEES TO OBEY DIRECTION "TO INVEST EACH SHARE SEPARATELY" IN TRUST—ACCOUNTING BY TRUSTEES—EXECUTORS AND ADMINISTRATORS. See *Matter of Watson*..... 408
- (34.) BEQUEST OF RESIDUARY ESTATE, ALL PERSONAL, TO TRUSTEES—INTENTION OF TESTATRIX—VESTING. See *Boynton v. Lahens*... 366
- (35.) BEQUEST OF PART OF RESIDUARY ESTATE—BEQUESTS TO UNINCORPORATED ASSOCIATIONS OR SOCIETIES—RESIDUARY ESTATE AS UNDISPOSED OF TO PASS AS IN CASE OF INTESTACY.
A bequest of one-third of a residuary estate to the treasurer, for the time being, of the "Womans Presbyterian Synodical Board in Aid of Foreign Missions of the Synod of Albany" which never was incorporated and went out of existence shortly before the will was executed, is invalid, as is also a bequest of one-third of said residuary estate to the treasurer, for the time being, of the "Womans Presbyterian Synodical Board in aid of Home Missions of the Synod of Albany" also not incorporated. *Matter of Gray*..... 398
- (36.) SAME.
The said two-thirds of said residuary estate will be decreed as undisposed of and pass as in case of intestacy. *Id.*

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